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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON ET AL.,

Appellants,

vs.

GULF REFINING COMPANY ET AL.,

Respondents

RESPONSE OF GULF REFINING COMPANY AND OTHERS TO THE PETITION FOR CERTIORARI AND BRIEF THEREON.

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RESPONSE OF GULF REFINING COMPANY AND OTHERS TO THE PETITION FOR CERTIORARI AND BRIEF THEREON.

I

Preliminary Statement

With deference, this is the most extraordinary application for certiorari, both under the law and as to the facts, whereunto we have ever assumed to answer. It is so unusual that we feel the safest course to pursue is to challenge in its entirety that assumed to be claimed, averring with confidence that naught occurred which petitioners do not concede should have properly happened.

II

The Facts as Developed in the Record

An original bill was filed in the Chancery Court of the First District of Jasper County, Mississippi, by the petitioners on June 10, 1944, claiming title to some 360 acres of land in said County and State under an alleged deed from N. L. Hudson to Mary E. Hudson, his wife, alleged to have conveyed to her a life estate with remainder at her death to grantor's heirs. The original bill shows the death of N. L. Hudson in 1895, and thereafter the disposition of the said lands in fee by Mary E. Hudson to those under whom respondents claim, such persons paying therefor value and entering into the possession thereof, which possession, however, was asserted by petitioners to be of the life estate only of Mary E. Hudson and that possession after her death by respondents was as tenants at sufferance of the petitioners who claim to be the owners of the remainder in fee after the death of Mary E. Hudson. Petitioners did not have possession of the alleged deed from N. L. Hudson to Mary E. Hudson, and no such deed is of record. Petitioners made defendants 106 persons and corporations, including Gulf Refining Company. Gulf Refining Company was joined in the suit as the holder of oil, gas and mineral leases on the lands involved or a large part thereof, which leases petitioners sought to cancel. Petitioners sought the cancellation of all conveyances, including leases to all the respondents, with the confirmation of the title which they claimed to have under the deed from N. L. Hudson to Mary E. Hudson. Thereto those respondents who purchased from Mary E. Hudson in fee and those claiming under such purchasers made full answer, denying title and setting up a conveyance in fee from N. L. Hudson to Mary E. Hudson in the year 1880 (Appendix "A" hereto, R. 895)

together with adverse possession for a period much in excess of ten years, plus estoppel and laches. Gulf Refining Company filed a detailed answer denying *seriatim* the allegations of the bill of complaint, and made its answer a cross bill and prayed for the confirmation of its leases from the parties in possession of and claiming to own the fee title interest in the lands. Petitioners appeared to the cross bill and filed a demurrer thereto.

Thereafter on December 15, 1944, for $50,000 cash paid to them by Gulf Refining Company, petitioners executed to respondent Gulf Refining Company a so-called protective lease (Appendix "B" hereto) wherein clause 14 provides (Appendix 53):

> "And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *v.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

In such lease it is also provided that Gulf Refining Company receives and retains its full right to litigate with the petitioners and to contend notwithstanding the protective lease that all its existing leases were valid and paramount leases. Note the precise language (Appendix 51) as follows:

> "It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in

recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid titles to the whole of the lands covered hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee (R. 765) shall in no manner be deemed or construed a repudiation of the terms of this lease."

Pursuant thereto development of the oil field was had with the accrual of large royalty but with the distribution stayed by reason of this litigation. Shortly thereafter this protective lease was executed. Additional counsel were procured by petitioners, who at once, according to his testimony in suit 270 *et al.* in the District Court of the United States, conceived that a transfer should be had from the State Court to the Federal Court. On December 12, 1945, petitioners filed a motion in the Chancery Court of the First District of Jasper County in said cause #398 (Appendix 30) reading as follows:

> "Come the complainants by their attorneys and move the court to dismiss this suit without prejudice at the cost of the complainants, which costs are tendered herewith."

Thereto, by certain respondents, specific written objections were interposed, though no response in writing was required under the state practice. Gulf Refining Company

filed no written response (Appendix 30-41). At the January Term 1946 of the Chancery Court of First District of Jasper County, Mississippi, the cause was heard solely on petitioner's motion to dismiss, which was taken under advisement by the court for decree in vacation, and overruled by the court on the 18th of January, 1946 (Appendix 63). On the hearing of the aforesaid motion to dismiss petitioners introduced substantially naught but the complaints which they had filed in the District Court of the United States in Cause #270, 271, 272 and 278, predicating their position solely upon those suits thus brought. There was no allegation nor any proof of any threats submitted to the court or called to the court's attention on such hearing. An interlocutory appeal from the said order of the Chancery Court of Jasper County, Mississippi, overruling the motion to dismiss without prejudice was properly denied both by the Chancellor and later by a Judge of the Supreme Court of Mississippi after conference with his fellow justices.

Due to there being only twelve days of court per year in the First District of Jasper County, Mississippi, when oil was therein discovered the court became congested and having so been the Chancellor called a special term to be held the first Monday of May of 1946, having at that time a period during which he was not engaged in other courts. Unquestionably the Chancellor assumed to write the letter (shown Appendix "C") which he transmitted to counsel asking that it be treated as confidential. Thereafter when court convened on May 6th the respondents attended. There were absolutely no deputies present and naught out of the ordinary occurred. We make this statement in accordance with the record wherein at Appendix page 75 it is said by the court:

> "I understand you all agree it is not necessary to enter any order on the allegations in the exceptions

with reference to the threats, that this court cannot protect its litigants and solicitors."

At that term, petitioners appeared by their counsel and fearing that rule that there were no special appearances in Mississippi, *McCoy* v. *Watson*, 154 Miss. 307, 122 So. 368; *Afro-American Sons & Daughters* v. *Webster*, 172 Miss. 602, 161 So. 318; *Finklea Bros.* v. *Powell*, 189 Miss. 454, 198 So. 293, filed a so-called protest whereon no order was asked and whereasto no evidence was offered and having thus done, the petitioners' counsel declaring their purpose said (Appendix 72 & 75):

> "It is not a motion, it is an objection to proceeding in the case. Our sole purpose is to present this objection to Your Honor.
>
> • • • • • • •
>
> *"It is our contention when our motion was made to dismiss this Court was divested of jurisdiction.* This objection is interposed to re-affirm that position, make clear to Your Honor what the purpose is. (Italics ours)
>
> • • • • • • •
>
> "Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room."

Thereafter, respondents made due proof and having thus done a final decree was entered in the form of Appendix "D" hereto, the most pertinent portions of the decree being (Appendix 76):

> "This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defendants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written

objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all of the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

"Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the courtroom which they then and there did;

"Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1

"That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, *and does not recognize the right of complainants to withdraw as was wrongfully done, the Court* (R. 749-B) *reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.* (Italics ours)

2

"That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice." • • •

Therefrom, an appeal was taken to the Supreme Court of Mississippi where the decree of the Chancery Court was affirmed, a copy of the opinion is Appendix "E" hereto.

Thereupon, petitioners suggested error, which suggestion was overruled on May 19, 1947, Appendix 82. Later, motion to correct was denied. Thereto certiorari from this Court is sought.

III

The Petition Should be Denied Under Well-Settled Principles

With deference to petitioners, this writ should be refused upon well-settled principles, which we epitomize and submit.

1. Reviewing by certiorari is not a matter of right, but of grace. *Angel* v. *Bullington*, 91 L. Ed. 557, — U. S. —. 28 U. S. C. A., Rule 38, Page 156, provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rescue Army v. *Municipal Court of the City of Los Angeles*, 91 L. Ed. 1221, 1233, — U. S. —:

> " 'the Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' • • • if the record presents some other ground upon which the case may be disposed of; • • •.
>
> "Some if not indeed all, of these rules have found 'most varied applications.' And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty. • • •
>
> "If government is to function constitutionally, for each to keep within its power, including the courts; the

inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.

"All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand, it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure."

2. Decision of constitutional question must necessarily be made. *Spector Motor Service* v. *Charles J. McLaughlin*, 323 U. S. 101-106, 89 L. Ed. 101:

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality— • • • unless such adjudication is unavoidable."

Confessedly, Mississippi's Supreme Court pretermitted deciding any Federal question, founding its affirmance solely upon local statutes and decisions as to cross-bills, leaving undecided, however, many of the local questions, all of which must have been precedently determined before invasion of constitutional rights could occur.

3. State law—statutory and decisions—normally controls. *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158-178, 88 L. Ed. 645-651 (Syllabus 2):

> "A State's Court construction of a state statute is not reviewable in the Supreme Court of the United States."

Sage Stores Company v. *State of Kansas ex rel. A. B. Mitchell*, 323 U. S. 32-36, 89 L. Ed. 25:

> "• • • The coverage of the Kansas statute is a matter solely for the determination of Kansas."

Hardware v. *Glidden Company*, 254 U. S. 151, 158, 76 L. Ed. 214:

> "• • • it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See Missouri ex rel Hurwitz *v.* North, 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

Snyder v. *Massachusetts*, 291 U. S. 674, 677, 78 L. Ed. 674:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing a long list of cases) Its procedure does not run foul of the Fourteenth

Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

General Trading Company v. *State Tax Commission of the State of Iowa*, 322 U. S. 335-340, 88 L. Ed. 1309, 1311:

"The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here."

Cardos M. De Castro v. *Board of Commissioners of San Juan*, 322 U. S. 451, 465, 88 L. Ed. 1384-1391:

"But the principle which these phrases were intended to express has not been more accurately and comprehensively stated than by Mr. Justice Holmes in words which are completely applicable to the present case, in Diaz *v.* Gonzales y Lugo, supra (261 U. S. 105, 106. 67 L. Ed. 551, 552, 43 S. Ct. 286):

" 'This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern."

Pennekamp v. *Florida*, 328 U. S. 331, 90 L. Ed. 1295-1303:

"While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

William Greenough v. *Tax Assessors of the City of Newport*, — U. S. —, 91 L. Ed. 1274, 1277:

"All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island."

U. S. v. *Petrello*, 91 L. Ed. 1403; *Atlantic Coast Line Railroad Company* v. *Glenn S. Phillips*, — U. S. —, 91 L. Ed. 1540:

> "But while it is true that we are not bound by the construction of local statutes by the local courts in deciding the Constitutional question, 'yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result.'" (Authorities)

Petitioners thoroughly understood the rule in Mississippi that when the Chancellor declined to dismiss without prejudice, petitioners could reach the Supreme Court only after a final decree and affirmatively elected to have a decree dismissing with prejudice so that they might therefrom thus appeal and when they so did, the sole questions presented were those arising primarily under the local law whereasto Mississippi's decision was controlling.

4. Hearing in Mississippi Court constitutional. There is no pretense but that the Chancellor and the Judges of the Supreme Court were unbiased and would have vouchsafed as to the merits a fair decision. So being, due process existed. *Jordan* v. *Mass.*, 225 U. S. 167, 56 L. Ed. 1038:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence would be to enforce exaction unknown to the precedents of the past, and an interference with the discretion and power of the state not justified by the demands of justice, nor recognized by any definition of due process."

Compare *Fay* v. *New York*, — U. S. —, 91 L. Ed. 1519. Herein consciously, in order to test the sufficiency of the

ruling of the Chancellor forthwith, petitioners forewent their hearing on the merits amply and adequately provided for under Mississippi's law and having thus done, may not herein complain when that by Mississippi's Court done was exactly that which petitioners, as to the Chancery Court, expected and as to the Supreme Court should have expected.

5. When petitioners voluntarily withdrew, being nonresidents of Mississippi, the Mississippi Court had plenary power, in virtue of such withdrawal alone, to render a final judgment of dismissal with prejudice. *Hammond Packing Company* v. *Arkansas,* 212 U. S. 322, 53 L. Ed. 531, 144 A. L. R. Note, page 372; *Illinois Central Railroad Company* v. *Sanford,* 75 Miss. 862, 23 So. 355.

Thus, strictly speaking, petitioners, by their course of conduct, effectively, at Mississippi's Court's election, would have precluded themselves from asserting even any State question.

6. When petitioners' counsel, being well acquainted with Mississippi practice, voluntarily withdrew so that an appealable final decree might be entered, it was incumbent upon Mississippi's Supreme Court on that appeal adversely to determine a Federal question, otherwise this Court would be without jurisdiction. *J. Howell Flournoy* v. *Samuel G. Wiener,* 321 U. S. 253, 88 L. Ed. 708-715:

> "The cause is accordingly dismissed for want of jurisdiction. In the view we take of the case we do not reach the question whether the appeal should not also be dismissed because of doubt whether the decision of the Louisiana Supreme Court as to Act No. 119 rests on a holding that the Act violates the Fourteenth Amendment, or merely that it is inapplicable as a matter of construction of a state statute not reviewable here. *With that left in doubt, we could not say*

that the decision of the state Supreme Court does not rest on a non-federal ground adequate to support it."

Herein, Mississippi's Court affirmed upon one point—the efficacy of a cross bill properly filed. Compare Annotation, 28 U. S. C. A., Section 344, Page 96, stating the well established rule thus:

> "To secure review by the federal Supreme Court of a decision of a state court on certiorari, the necessary prerequisite is exemplification of a federal question that was affirmatively presented, that its decision was necessary to the determination of the cause, that it was actually decided or that judgment as rendered could not have been so without deciding it. Williams *v.* Keyes, Fla. 1939, 186 So. 250."

Mississippi may alter its rules of decision and of practice at pleasure. While we specifically deny that Mississippi's Court thus did, yet thereasto this Court has said: (*Frank L. Huddleston* v. *R. H. Dwyer,* 322 U. S. 232, 88 L. Ed. 1246-1249):

> "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith *v.* Winter Haven, 320 U. S. 228, ante, 964, S. Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with *the then* controlling decision of the highest state court'. Vandenbark *v.* Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327, 330, 61 S. Ct. 347."

The Fourteenth Amendment does not transform the erroneous determination of a question of local law into a violation of the Fourteenth Amendment. *Milwaukee Electric Ry.* v. *Wisconsin*, 257 U. S. 100, 64 L. Ed. 476, 480:

> "But, however that may be, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, (Backus Jr. & Son *v.* Fort Street Union Depot, 169 U. S. 557, 569, 42 L. Ed. 853, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error (Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91, 16 Sup. Ct. Rep. 80; Tracey *v.* Ginzberg, 205 U. S. 170, 51 L. Ed. 755. • • •"

American Railway Express Company v. *Commonwealth of Kentucky*, 273 U. S. 267, 71 L. Ed. 639-641:

> " 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' Enterprise Irrig. Dist. *v.* Farmers Mut. Canal Co., 243 U. S. 157, 165, 166, 61 L. Ed. 644, 649, 37 Sup. Ct. Rep. 318. It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Compare *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755; *Neblett* v. *Samuel L. Carpenter*, 305 U. S. 297-305, 83 L. Ed. 183-187; *Louis Buchalter* v. *People of the State of New York*, 319 U. S. 427-432, 87 L. Ed. 1492-1495. *Charleston Federal Savings & Loan Association* v. *George P. Alderson*, 324 U. S. 182-193, 89 L. Ed. 857:

> Headnote 9. "Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials."

Market Street Railway Company v. *Railroad Commission of the State of California,* 324 U. S. 548, 89 L. Ed. 1171, 1180:

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitional rights."

7. So far as Federal rights are concerned, there could be naught herein other than harmless error. Compare 28 U. S. C. A., Section 391:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. Section 726, Mar. 3, 1911, c. 231, Section 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181)."

Herein, Mississippi's Court, on appeal, never went beyond the effect of a cross bill. It dealt with no other or further question and as to the effect of a cross-bill, this Court was, with deference, powerless, as that matter was one strictly for local determination. So being, therefore, at most that which could have herein occurred was "harmless error", there being divers State questions existent before the Federal Constitution could have been in any wise reached. Compare *Gus Kotteakos* v. *United States,* 328 U. S. 750, 90 L. Ed. 1557.

8. Frankly, at most, that determined by the State Court involved not questions of law so much as questions of fact.

So being, certiorari did not lie. Compare *United States* v. *William R. Johnson*, 327 U. S. 106, 90 L. Ed. 562, 566:

> "Under that Rule the Circuit Court of appeals here, after studying the issues raised, and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous."

9. But if it be that this Court should feel that this Writ cannot be under the above authorities denied, then we, with deference, submit

IV

The Alleged Threats Relied Upon as Predicate for Federal Interposition for Certiorari Are Nonexistent in the Record and in Fact.

There is much said and much more innuendo as to what petitioners are pleased to call "threats and intimidation". We wish to state, frankly, to this Honorable Court, without fear of successful contradiction, that there is in this immense record not one scintilla of evidence and no reference to any such alleged threats save those vague statements made in petitioners' argument which, it is submitted, are calculated to mislead this Honorable Court into thinking, contrary to the fact, that petitioners and their counsel and witnesses were in this most unusual manner denied the equal protection of the law.

Petitioners did not have the temerity to present any allegation of threats in any action in the Chancery Court. As a matter of fact, counsel for petitioners had determined on their course of procedure in the Chancery Court long prior to the time the Chancellor wrote his letter asking for

suggestions with respect to what he had heard but of which he disclaimed any knowledge whatever.

In their motion to dismiss (Appendix, p. 30), petitioners made no mention of any fear of danger on their part. In their "protest and objection" filed and presented by petitioners' counsel in person on the very day this cause was called for trial by the Chancellor, there was a reference to the fact that a trial could be had in the Federal Court in an atmosphere free of threats and intimidations. There is no allegation or intimation that the same free atmosphere did not exist in the Chancery Court.

If petitioners believed, which, with deference, we aver they did not, that things were so bad they could have made a motion for continuance or possibly for a change in venue. The fact that no such motion was made is indicative that the petitioners knew there was no ground therefor.

Therefore, threats did not constitute an integral element of the rights which petitioners assumed to assert when this cause was heard. At the January Term, 1946, petitioners were present in force and introduced under this motion all evidence by them deemed appropriate. Appendix 61, 62. And in this evidence there is no threat mentioned. Thereafter, when Petitioners sought interlocutory appeal to the State Supreme Court to vindicate their assumed right of absolute dismissal without prejudice at their election, they did not assume to present to the Supreme Court of Mississippi any alleged threats of any kind or character.

Now, the Chancellor on his own responsibility, insofar as this record shows, having a vacant period in May, called a special term of the Chancery Court and intended presumptively to clear the congested docket then existent. At that time, without procuration, sofar as this record discloses,

of any person the Chancellor wrote his personal, confidential letter. Therein that said was (Appendix 63):

> "It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected."

Whereasto, consider:

1. Carefully analyze the letter of the Chancellor. He recites in the past tense the calling of the term and his authority to act, and then says: "I am directing the sheriff to appoint" and concludes with a request for suggestions. The Chancellor may not lawfully act save by an order appropriately spread upon the minutes of the court. No such order at any time was made and does not at any place appear of record and that herein asked is for this court to assume that the Chancellor did that whereof there is no record, which he did not do, and whereasto he asked suggestions, presumptively pursuant to such suggestions he found the course initially suggested as inappropriate.

2. There is no showing whether these threats were made by complainant or defendant and if they were made by defendant, there is no showing which of these more than 100 persons made such threat, how, when or where. Under settled Mississippi law any personal knowledge upon the part of the court cannot form the predicate of judicial action but must be integrated into the record in such shape that the law will recognize. As early as *Smith* v. *Moore*, 3 How. 40, 42, Mississippi's Supreme Court said:

> "But he cannot give a judgment upon his private knowledge; for he is obliged to give it according to law and what is proved."

Compare *Gillespie* v. *Doty*, 160 Miss. 684, 135 So. 211, wherein petitioners were directly admonished if they desire to utilize that known by the Judge, it was requisite that he be sworn as a witness. So knowing, they consciously refused to utilize him. Therefrom, we deduce that his evidence as given could not have been in any way satisfactory to them. Compare *Bunckley* v. *Jones*, 79 Miss. 1, 29 So. 1000. Compare, also, *Armstrong* v. *Jones*, 198 Miss. 627, 22 So. 2d 7; 20 Am. Jur., "Evidence", Sec. 52, p. 52; 31 C. J. S., "Evidence", Sec. 11, p. 516; 131 A. L. R. 258. So that what the Judge knew, if he knew anything adverse to respondents, and petitioners desired to rely thereon, their obligation was plain. They have not integrated that requisite into this record.

But we desire to advert to the fact that at the May Term, petitioners were present by counsel and were directly asked by the Chancellor as to that which they desired to do in this regard, whereunto the record shows the response was (Appendix 75):

> "I understand you all agree it is not necessary to enter any order on the allegations in the exceptions with reference to the threats, that this Court cannot protect its litigants and solicitors.
>
> "I will proceed with the trial of the case."

And this Court has adopted the fundamental maxim of Broom: page 163 "*De non apparentibus et non existentibus, eadem est ratio.*" Compare *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. ed. 355, 359.

This Court will recollect in the early days the opinion of the higher State courts was not a part of the record and might not be adverted to for jurisdiction, even though appearing. Furthermore, the final decree specifically covered this wilful withdrawal and specifically found that

there was no motion for a continuance and no ground therefor. Appendix 76.

Further, petitioners did not make a motion for a change of venue, if that might have been granted. Against these alleged threats, by whom, not shown, the extent of which are totally undisclosed, and their extent not made apparent by petitioners whose duty it was thus to do, related solely to the proceedings in the State Court and as such might constitute an offense against not the United States but the State of Mississippi wherein rectification should be. Furthermore, the weight of that thus done would have overborne completely respondents if they had dared to be guilty thereof. No sane litigant would for a moment tolerate the insufferable obstacle upon his cause cast by such a course of conduct and we appeal to the maxim "*Omnia praesumuntur rite et solenniter esse acta*", Broom's Legal Maxims, 165, 951. No claim could thus be presumed, nor an intolerable burden on respondents would be presumed.

But if, for the sake of argument, all be admitted as to threats, still such threats so thus existent (and we do protest solemnly they were not existent) do not constitute, when committed by a litigant, any act of the State of Mississippi, and it is a condition precedent to the application of the Fourteenth Amendment that the act should be by the State. Mississippi is sovereign in this aspect and her acts thereasto, with deference, are adequate to protect petitioners who, under this record, have no right to stamp the judicial proceedings, wherefrom they voluntarily withdrew, as contrary to the Constitution. Compare *Texas* v. *White,* 154 U. S. 519, 520, 38 L. Ed. 1084.

That whereasto jurisdiction here is sought is broader than the Fourteenth Amendment, and the Fourteenth Amendment did not contain within its ambit rectification by this court of all wrongs by individuals committed. When

circumscribed to state action, the burden cast on this Court is amply adequate, but if extended to requiring that rectification be wrought when predicated upon improper individual action, the burden would be intolerable. The States and their courts would pass into innocuous desuetude.

3. Under the rules of this Court, whereunder certiorari may be granted as of grace, *Angel* v. *Bullington*, —U. S.—, 91 L. Ed. 557, with deference, we submit alleged threats, not validly integrated into the record, furnish no possible predicate as both the Chancery Court and the Supreme Court of Mississippi have found as a fact, as we interpret their opinions, these to be nonexistent to an extent that would in any way impair petitioners rights.

V

Response to Petitioners' Contentions

Appropriately, petitioners' counsel concede (Br. p. 14):

> "Since the moment they filed their Motion to Dismiss without prejudice, Petitioners have placed their sole reliance on the Constitutional Rights they asserted at every stage of the State Court proceeding. Neither the trial court nor the Supreme Court of Mississippi noticed or referred to the Federal questions raised and apparently neither court gave these Federal questions any consideration whatever."

And assume to imply a conscious disregard of alleged constitutional rights by Mississippi's courts. With deference, fundamental error is thus committed. We challenge petitioners' statements both of fact and law when inconsistent with that here declared and these inconsistencies are developed when we make reference to the points whereon we rely. Certiorari should not, under well-settled general principles, be herein granted, petitioners having voluntarily with-

drawn from the court according to their concession in order that they might effectively appeal under settled Mississippi practice, *Mitchell* v. *Film Transit Co.*, 194 Miss. 550, 13 So. 2d 154, and thereby test the rightfulness of their contention that they might dismiss without prejudice, the Mississippi practice forbidding piecemeal appeals, *United States Alkali Export Association* v. *United States*, 325 U. S. 196, 89 L. Ed. 1554, and in order to obtain such appeal from a final judgment, petitioners forewent their right to a hearing on the merits. Compare *Market Street Railway Co.* v. *Railroad Commission of the State of California*, 324 U. S. 548, 89 L. Ed. 1172. Especially when, as here, the State Supreme Court affirmed solely upon a construction of its local practice leaving undetermined many other local questions upon which it might validly have affirmed the Chancellor's decree.

VI

Replying Seriatim to the Points Relied Upon for the Issuance of the Writ, Said Points, With Our Responses Thereto, Are as Follows:

A

Petitioners' Point A, Br. p. 29 and 40:

> "It is duty of state court to enforce rights under the Federal Constitution."

Whereto, respondents answer:

Unqualifiedly and unconditionally, but equally reciprocal is the obligation of this Court to respect decisions as to State law. Authorities *supra*. Under this heading, Petitioners make what is, with deference, a false claim and we desire to challenge. The statement we challenge is: (Br. p. 41).

> "• • • At the crucial time when the trial court was attempting to force Petitioners to trial under

> armed guards *Petitioners burned their bridges behind them* and staked their main reliance on their claim that they were not being granted due process of law and the equal protection of the laws." (Italics ours).

This is untrue in fact and unsound in law.

(a) Petitioners conceived that it would be more advantageous to their cause if they abandoned the State court and transferred the litigation to the Federal Court. Appendix "F" hereto, Testimony of Ben F. Cameron in Cause No. 270, United States District Court. Having filed these suits, No. 270, et al., in the Federal Court, on December 11th, petitioners, on December 12th, made a motion, hereinabove quoted, whereunder they made absolutely no averments as to threats of any kind or character, presenting as a predicate for this motion that said by petitioners when withdrawing from the court (Appendix 72):

> "It is our contention when our motion was made to dismiss this Court was divested of jurisdiction. This objection is interposed to reaffirm that position, make clear to Your Honor what the purpose is."

B

Petitioners contend (Br. p. 42):

> "This Court has Final Say Where Claim is Based on Denial of Constitutional Rights."

This, respondents admit.

C

Petitioners contend that the action taken by the State Courts was a violation of the Fourteenth Amendment of the Constitution of the United States in ten specific aspects, dealt with herein seriatim:

I

Petitioners contend: (Br. 44):

"In Overruling Petitioners' Motion to Dismiss Without Prejudice."

Whereto our response is:

(a) Petitioners contend that they had the absolute right to dismiss their claim "under the laws of the State of Mississippi," p. 44. This right was promptly controverted in the Chancery Court and petitioners admonished by the decision of the Chancellor that they were not thus entitled under Mississippi law. Petitioners well understood their obligations when they determined to stand on a refusal to proceed, when the Chancellor refused to dismiss without prejudice, saying (p. 50, 58 and 59):

"• • • • It was extremely urgent that Petitioners be given this opportunity to test finally their right to dismiss because of the rule of Mississippi practice providing that a litigant waives his right to dismiss without prejudice if he goes to trial on the merits—see e. g. Mitchell et al. *v.* Film Transit Co., et al., (1943) 194 Miss. 550, 13 So. (2d) 154, • • •."

"Under Mississippi procedure, when Petitioners declined to proceed further at the special term of chancery court the only thing the chancellor could do was to dismiss their bill with prejudice:

" 'In order to carry out his purpose the guardian should have declined to proceed with the trial and thereupon the defendant would have been entitled to dismissal with prejudice, which would have been a final judgment appealable by the guardian.'

"Mitchell *v.* Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.

"That is the latest pronouncement of the Supreme Court of Mississippi, and is in a case involving procedural questions exactly like this one—even to the

point of involving a cross-bill by the Transit Company." • • •

"Petitioners, faced with the extreme situation outlined above and called upon to decide their course of action, had the perfect right to accept the rule above quoted from a case hardly four years old."

This is reiterated on page 41.

Note the Chancellor on the final hearing decreed (Appendix, 77):

"That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice."

Therefrom, under the *Mitchell* Case petitioners forthwith, having stood upon the motion to dismiss without introducing any evidence whatsoever, except substantially their complaints in the Federal Court, appreciated that they were possibly in contempt, constructively at least, of the Chancery Court and that therefore under settled Mississippi practice their bill would be dismissed with prejudice so that in fact petitioners received from the Chancery Court precisely that which they knew they would get when they thus acted. Compare *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. Ed. 530; Annotation, 144 A. L. R. 372; *Illinois Central R. Co.* v. *Sanford,* 75 Miss. 862, 23 So. 355, 942. Note how Mississippi's court dealt with a somewhat similar situation in *Equitable Life Assurance Society* v. *Clark,* 80 Miss. 471, 31 So. 964. So, as a question of local law, petitioners were precluded from complaining when they thus elected to stand. Compare *American Railway Express Company* v. *Commonwealth of Kentucky,* 273 U. S. 267, 71 L. Ed. 639. A precisely similar principle has been approved by this Court where special appearances are

prohibited as is the case in Mississippi and the State may constitutionally require that a party so circumstanced elect and his election, if erroneous, does not contravene the constitution. *York* v. *Texas,* 137 U. S. 15, 34 L. Ed. 604, 605:

> "* * * The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni *v.* Greenhow, 107 U. S. 769 (27:468). It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. * * * Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not."

Approved by this Court several times, recently in *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 85 L. Ed. 624. Compare *Kauffman* v. *Wooters,* 138 U. S. 285, 34 L. Ed. 962; Section 1881, Mississippi Code of 1942, and annotations thereunder.

Thus petitioners voluntarily elected to forego submission of the facts to an impartial tribunal for decision on the merits so that they might before the Supreme Court of Mississippi, preserve their right to claim dismissal without prejudice. *"Volenti non fit injuria,"* Broom's Legal Maxims, 268. Constitutional rights may equally be fore-

gone. Compare *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855, 858, where it is said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. Pierce *v.* Somerset R. Co., 171 U. S. 641, 650, 43 L. Ed. 316, 320, 19 Sup. Ct. Rep. 64; Wall *v.* Parrot Silver & Copper Co., 244 U. S. 407, 411, 61 L. Ed. 1229, 1230, 37 Sup. Ct. Rep. 609."
>
> S. p. *Yakus* v. *United States*, 321 U. S. 414, 88 L. Ed. 834.

Therefore, petitioners came to Mississippi Supreme Court voluntarily having foregone the right to be heard on the merits so that they might insist upon this technical right.

Specifically, petitioners refer to the State law as admeasuring their rights to dismiss and so it did. The Chancellor held the right nonexistent and on appeal to the Supreme Court of Mississippi, as to Mississippi's law, his decree was affirmed. The Supreme Court dealt only with one State question, namely: The effect of the cross-bills interposed under Mississippi's practice. Note that said by Mr. Justice Smith, Appendix 84:

> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so *and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.*" (Italics ours.)

In the conclusion of this opinion, Mr. Justice Smith said, Appendix 87:

"We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; * * *.

* * * "In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, *we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.*" (Italics ours.)

Petitioners claim the Chancellor should not have dismissed the bill with prejudice, but thereasto respondents insist the action proper because—

A cross-bill had been interposed by the Gulf Refining Company and also by the Ridgway group. We direct particular attention to that said in the cause by Mr. Justice Smith, it being noted that petitioners were not content to dismiss merely their bill but demanded the entire suit should have been cleared from the Chancery Court. That at issue is, with petitioners unwilling to accede to a mere dismissal of their original bill without taking the cross-bills, petitioners were unwilling to have the order entered. The matter of the cross-bills will be dealt with later, but Mississippi's Court has uniformly held under its State practice that these cross-bills must remain at the pleasure of the cross-complainants whereasto we advert first to Mississippi statutes and second to Mississippi decisions.

Mississippi Statutes. 1. That statute whereunder petitioners sought dismissal is Mississippi Code of 1942, Section 1539:

"The plaintiff may suffer a nonsuit, or dismiss a cause, before the clerk in vacation, on paying all costs that have accrued; and the clerk shall enter on the declaration the disposition made of the same, with the date. Where the plaintiff has received satisfaction

> of the cause of action in vacation, he shall, by himself or his attorney, enter such satisfaction on the declaration, and sign the same; and where the plaintiff suffers a nonsuit; or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted suit; but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand."

2. Thereunder petitioners have not as yet paid the costs as was a condition precedent to such action. Note the statute "on paying all costs that have accrued". Petitioners assumed to make an alleged tender instead of conforming to that made mandatory by the Legislature. *Guion* v. *Doherty,* 43 Miss. 538; 13 West Publishing Co. Digest, Title "Tender", Key No. 24.

3. Note the concluding paragraph of this Section:

> " * * * but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand."

Beginning with the Code of 1857, this has consistently been Mississippi policy. Section 595 of the Code of 1930, Section 803, Code of 1906, Section 741, Code of 1892, are identical, giving by statute "in term-time or vacation" the right to the respondents thus to proceed. It might be contended that the phrase "set-off" did not embrace a suit to confirm or to recover amounts paid out by respondents, but it will be noted that the terminology of this section is

as to the Circuit Court, but that it is equally applicable to the Chancery Court and that, therefore, "declaration" must be read "bill" and the set-off claiming affirmative rights the equivalent of a cross-bill.

In the Code of 1880, Section 1722, the verbiage is somewhat variant.

Note Section 642, Code of 1871, wherein the provision hereasto is:

> "Sec. 642. * * *; and where the plaintiff suffers a non-suit or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted such suit; *provided,* that this section shall not extend to cases in which the defendant has filed or pleaded any set-off or payment, unless by consent of such defendant."

The Code of 1857, Chapter 61, Art. 160, provides:

> "Art. 160. * * * and where the plaintiff suffers a non-suit, or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted such suit: *Provided,* that this article shall not extend to cases in which the defendant has filed and pleaded any set off, or payment, unless by consent of such defendant."

This local statute, containing this verbiage, was for judicial admeasurement as to its contents a local question. Petitioners definitely knew of this law and so knowing elected to act as they did rather than to have their cause determined on its merits.

Frankly, Mississippi's court has not stressed this statute, but its existence and interpretation are most pertinent and this Court will not grant certiorari as to a Federal question with such a local statute on the threshold. Compare *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. Ed. 1050.

Mississippi Decisions. 1. The fundamental policy of Mississippi as mirrored in its Bible as to chancery proceedings (Griffith's Chancery Practice) contains this declaration, (Appendix 85):

> "* * * And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. * * *".

And as at the date of the rendition of this decree, all persons were before the court, with Gulf Refining Company and Tidewater, under their respective leases, vested with a defeasible title to the oil in place, with the right to work it to exhaustion.

Compare *Koenig* v. *Calcote,* 199 Miss. 435, 25 So. 2d 765, where it is said:

> "* * * the trial court's conclusions also fail to take into account that when the Calcotes executed the oil and gas lease in favor of the Sun Oil Company they had left to the, first, a reversionary interest in the oil, gas and other minerals, if and when the oil and gas lease should 'for any reason' become canceled or forfeited, second, the right to receive the rentals and royalties during the life of the lease, and, third, the fee-simple title to the soil. Armstrong *v.* Bell, Miss., 24 So. 2d 10, and 3 Summers Oil and Gas, Perm. Ed., p. 486, Sec. 601, wherein Mr. Summers states that 'it necessarily follows that after a fee owner of land has leased it for oil and gas purposes he has three distinguishable legal interests in the land and minerals. He has ownership of the land subject to the lease, the right to receive the rents and royalties under the

lease, and a reversionary fee interest in the minerals in place'."

Compare *Merrill Engineering Co.* v. *Capital National Bank,* 192 Miss. 378, 5 So. 2d 666.

Therefore, the oil companies owned 7/8ths of the value of the oil—whereasto this litigation is substantially—and the royalty owners, under whom they entered, held 1/8th royalty and thus the suit to confirm sought establishment of title, *quo ad* the oil in Gulf and Tidewater, as against the Hudsons, and should they therein fail, then as to the Gulf recovery of the costs of sinking its discovery well, with the obligation upon the Gulf and Tidewater, having entered under the original lessors, to bear full fealty to that title, with estoppel, so long as possession was held to attack. Compare *Johnson* v. *Langston,* 179 Miss. 622, 176 So. 531; *Simpson* v. *Ricketts,* 185 Miss. 280 186 So. 318; *Johnson* v. *Carter,* 193 Miss. 781, 11 So. 2d 196; 32 Am. Jur., p. 118; 35 C. J., p. 1239.

Being thus circumstanced and obligated with all persons before the court, the decree on the cross-bill was thus rendered and in so doing, as pointed out by Mr. Justice Smith, conformity was had to Mississippi practice.

In respondents'—Gulf Refining Company's—brief in the Supreme Court of Mississippi this contention in one aspect was stated after quoting Griffith's Chancery Practice, adopted by Mr. Justice Smith. This brief further stated (p. 20):

"Thereunder, Mr. Justice Griffith cites:

"(a) Ladner *v.* Ogden, 31 Miss. 332, 339, 344:

"'* * * The Court may, however, annex such conditions to the order for a dismission as the circumstances of the case require. * * *

" 'When a cross-bill is filed for relief, separate and independent of the original bill, but touching the same property, or growing out of the same subject matter involved in the original bill, and involving the rights of the co-defendants to the original bill, the dismissal of the original bill would not necessarily dismiss the cross-bill; * * *'.

"(b) Compare Gilmer *v.* Felhour, 45 Miss. 627.

"(c) In Dewees *v.* Dewees, 55 Miss. 315, 318, 319, the court said:

" 'We think it was proper also to retain the cross-bill for final hearing. The general equity rule is that the dismissal of the original bill carries with it the cross-bill; but, as said in Ladner *v.* Ogden, 31 Miss. 332, this result will not necessarily follow where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject-matter involved in the original bill. * * *

" 'It was a matter eminently within his discretion, to be wisely exercised, so as to accomplish justice between the parties.'

"(d) Sigman *v.* Lundy, 66 Miss. 522, 525, 6 So. 245:

" 'The cross-bill was properly retained after the dismissal of the original bill. Belcher *v.* Wilkerson, 54 Miss. 677; Dewees *v.* Dewees, 55 Miss. 315. In the latter case it is distinctly announced as the true rule that the dismissal of the original bill will not necessarily carry with it the cross-bill, where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject-matter involved in the original bill.'

"(e) Compare Peoples Bank *v.* Pennington, 137 Miss. 653, 102 So. 386, 103 So. 144.

"(f) Federal Credit Co. *v.* Newman, 16 So. 2d 619:

" '* * * The cross-bill was lawfully filed under the order of the court in full force at the time, and now

to dismiss it along with the original bill, although ostensibly without prejudice, would be to let in the defense of the statute of limitations as to several cross-defendants, working thereby a palpable injustice to the cross-complainant. See the discussion of the subject and the citations of the cases in Griffith's Mississippi Chancery Practice, Section 384. It was error to dismiss the cross-bill or in any way to interfere with any procedure or order taken by virtue of it.' "

Compare *Jackson* v. *Lemler,* 83 Miss. 37, 35 So. 306.

So, that with deference, this case but applied that which had been precedently the law in Mississippi, but at all events was a question of local, not Federal, right.

But, in addition to this interposition of the cross-bills, there were the following additional factors which precluded, under State practice, or could have under State practice, this dismissal without prejudice:

Upon December 15, 1944, the petitioners executed a protective lease unto the Gulf wherein was contained this provision:

"And, further, notwithstanding any provisions of this lease, apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *vs.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

After the execution of this instrument, it might possibly well be, under the State practice, that complainants did not possess this right. Compare *Blakey* v. *Blakey*, 3 J. J. Marshall 674 (Ky. 1830); 17 Am. Jur., Sec. 7, p. 61; *Jarvis Ex'r* v. *Interstate Coal Co.*, 257 Ky. 656, 78 S. W. 2d 926; *Trust Co.* v. *Fitzpatrick*, 71 Miss. 347, 14 So. 270; *Russell* v. *Denson*, 98 Miss. 859, 54 So. 439; *Adams* v. *Lucedale Commercial Co.*, 113 Miss. 608, 74 So. 435.

In view of the peculiar character of this cause, predicated as it is upon a lost deed, alleged to have created a life estate with remainder over, it is submitted that petitioners were and are not entitled to a non suit, because through discovery had, interrogatories answered and records examined, there has been made available and competent such evidence as to preclude effectively and effectually the assertion by petitioners of any right to this land. So when petitioners thus circumstanced sought to dismiss, it was a question for Mississippi's court to determine. Such a benefit had accrued to respondents as that respondents' consent to a dismissal was prerequisite. The Chancery Court thus thought thereasto. The Supreme Court did not actually pass but reserved its opinion. With deference, Mississippi might at pleasure require parties instituting suits to have the same continued until Mississippi determined that the right accruing to defendants would not be affected and, with deference, might even go one step further and require that when full answer had been made, consent of respondent would be requisite. This is a matter of State practice whereover the State of Mississippi is sovereign and whereasto there was lacking Federal authority.

But petitioners concede that under the settled rule in Mississippi, it was obligatory upon petitioners to submit to

a judgment on the merits when the Chancellor declined to dismiss without prejudice, if the petitioners desired to test as a State question the sufficiency of their right so thus to act, and when thus knowing that their right to relief would be determined by the decision of the State Supreme Court after full hearing, the petitioners may not raise a Federal question as to the way in which Mississippi Supreme Court decided the interpretation of Mississippi statutes, it being obligatory upon this Court at all times as to Mississippi procedural statutes to conform. Not even an unexpected change in judicial opinion, had the ruling been precedently contra, was sufficient to give petitioners a right to review, for as to State questions in matters of State policy, the State Court was supreme.

Compare *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91, 95:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States. Walker *v.* Sauvinet, 92 U. S. 90 (23:687); Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26 (28:889, 895); Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162, 171 (36:925, 930); Bergemann *v.* Backer, 157 U. S. 655 (39:845)."

Compare *A. M. Klemm & Son* v. *City of Winter Haven*, 309 U. S. 638, 84 L. Ed. 433, 993; *Neblett* v. *Carpenter*, 305 U. S. 302, 83 L. Ed. 182, 187, where it is said:

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment." (Collecting cases.)

Compare *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544, 49 L. Ed. 872. We adopt as unquestioned law that said by Mr. Justice Holmes, and as reannounced in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1493:

> "The fallacy underlying the rule declared in Swift *v.* Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute', that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'parties are entitled to an independent judgment on matters of general law:' 'but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
> 'the authority and only authority is the state, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word'. Thus the doctrine of Swift *v.* Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' "

It was never controverted that as to lands and local statutes, the law of Mississippi was what its Supreme Court said it was in virtue of its court so saying after full hearing. Therefore, when that court construed its statutes and its common law as to the efficacy of this cross-bill under those laws that court then spoke with authority.

Much is later said by petitioners as to the right to

retain the cross-bills and thereon to proceed, but Mississippi's policy is amply declared by Mr. Justice Griffith in his work, hereinabove quoted, and when under the *Film Transit* case, admitted to be specifically applicable, there had been no dismissal as to any person and all persons were present in the court on May 6th, except the petitioners who had voluntarily withdrawn, it was then a question for Mississippi court whether the cross-bills, undismissed, with the original bill undismissed, for that court to determine what it would do and when it dismissed on the merits as petitioners admitted that they knew it might do, then when all of these respondents, more than 100 in number, were before the court that adjudication was, with deference, proper, because it would have been the heighth of absurdity to have compelled the Gulf and Tidewater to bring in by process those who were present in court by additional pleadings and await probably a six months' period or more before those who were then present and willing to be heard should be heard, visualizing, as we have hereinbefore shown, the extent of the rights that were in these parties vested.

But, with deference, petitioners have placed themselves in an indefensible position. They admit, under the *Film Transit* case, it was inevitable that dismissal on the merits should be had—Mississippi practice so required—but, say petitioners, the course of conduct by the Chancery Court and the Supreme Court violated their constitutional rights in virtue of the hearing had on May 6th.

(a) If the only thing that the Chancery Court could have done was the rendition of a decree of dismissal without prejudice the Chancery Court thus so did, as hereinabove quoted, and thereby it was determined as between petitioners and all parties that petitioners had no right, title or interest in this property and were not entitled to re-

cover. Advert to quotation from petitioners' brief herein made.

So that, after the adjudication under section two of the final decree, dismissing petitioners bill, as was admitted appropriate, then that thereafter done was, even if void, which we deny, ineffective and the fundamental maxim is: "*Utile per inutile non vitiatur,*" Broom's Legal Maxims, and therethrough under petitioners' concession, effective title was lost to the same extent and in the same manner, so they claim, as if confirmation had been had so that when the decree was had dismissing the bill, rectification was wrought. Now, with petitioners thus admitting under the *Film Transit* case that this judgment was inevitable, that which they now seek is to make this Court reverse so as that there may be a dismissal without prejudice in virtue of that which subsequently occurred when, according to petitioners' concession, cancellation with prejudice under a dismissal was inevitable. Frankly, when petitioners thus conceded the dismissal with prejudice, appropriate for their proper presentation by final decree, there is naught else in this case whereas to this court with its multi-form duties need be burdened. In short, petitioners had to happen to them precisely that which they knew would happen and having happened they may not reverse their election and claim that whereto they were fully advised, the law gave them no right.

(b) But one step further, it is true that when petitioners declined to participate in the hearing the court was not obligated to deal with them in the usual manner, for, frankly, walking out on a court is a course of conduct that brings the judicial system into contempt and if counsel at this bar should advise this Court that under its decisions, it was obligatory upon this Court to reverse a decision made, let us say, in the Circuit Court of Appeals, and that

this Court should thereupon disagree with counsel as to the necessity for a hearing and counsel should thereupon advise this Court that he would withdraw and stand upon his right to appeal to high heaven, that would not deter this Court from making an appropriate determination under the Constitution, as here understood. But after this Court had so thus in good faith done, counsel who had thus walked out, would not be in a position where he could be further heard. Compare *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. Ed. 530; Annotation, 144 A. L. R. 372; *Illinois Central R. Co.* v. *Sanford,* 75 Miss. 862, 23 So. 355, 942.

In short, Mississippi, as well as many other States, has passed statutes under which, when parties withdraw in virtue of such withdrawal, judgments may be rendered as by default, but therein Mississippi deals exceedingly tenderly with matters of this character. Compare *Equitable Life Assurance Society* v. *Clark,* 80 Miss. 471, 31 So. 964. But as pointed out by Mr. Justice Griffith, citing *Baird* v. *Bardwell,* 60 Miss. 164, 169, Mr. Justice Cooper said:

> "* * * The absence of the complainants in no degree affected the right of the defendants to submit the case for final hearing—they had the right to do this, * * *".

Approved by Griffith's Chancery Practice, Sections 538 and 562. So that, when petitioners walked out on the court, strictly as a matter of law, this Court might have, as petitioners admit, dismissed with prejudice, but the Chancellor was minded to find out what were the real facts and when petitioners had refused to disclose what facts they had in mind and under their control, these respondents introduced a public record of Jasper County showing a warranty deed in fee simple from N. L. Hudson to his wife, Mary E. Hudson, for this entire property in 1880 and

established by three practicing attorneys (the public records having been destroyed September 10, 1932), that they were familiar with this title and that it was in fee simple. In addition, respondents showed absolute possession under conveyances of the entire title. Compare *Peeples* v. *Boykin,* 132 Miss. 359, 96 So. 177, where the effect of recorded conveyances is judicially established. Thus respondents showed

(a) That there was no life estate;

(b) That there was a conveyance in fee;

(c) Absolute possession taken under claim and color of right, continuing for possibly 60 years. Now, even if we admit, which we do not, that it was improper for the Court thus to admit this evidence, still thereby the Court rendered only that decree which it would have rendered had this evidence not been introduced and, therefore, when the evidence was introduced and made the court's mind doubly sure, petitioners were in no way prejudiced when the Court's decree, rendered after the hearing, was precisely the same it would have been had the Court done that which counsel admit under the *Transit* case was absolutely requisite and necessary.

In Mississippi, in order for a person to assign error, it is quite essential that the error assigned should be of a matter which was detrimental to the party assigning and if on the record the right result has been reached upon the record before the court, the court will affirm it even though there might be certain erroneous rulings therein apparent. So, herein, petitioners concede the necessity of the rendition of the court of this judgment of dismissal with the right of the Supreme Court of Mississippi to pass thereon, but contend that this Court will grant certiorari to reverse in virtue of alleged erroneous proceedings had subse-

quently, which, *per se* according to counsel's admission, in no way changed the extent whereto petitioners lost their rights. In short, petitioners toyed with the Chancery Court, taking the view that they knew more accurately that which the Supreme Court would hold under these peculiar facts than did the Chancellor and so knowing they voluntarily ignored the admonition given by the Chancellor that they might not dismiss without prejudice and so withdraw as to render it quite essential that the Chancellor should, to preserve the dignity of his court render a dismissal. That is what petitioners sought; that is what petitioners got, and knew they were going to get, and having gotten it, the Supreme Court held the learned Chancellor correct and that, as is perfectly obvious from this petition, the petitioners were in inexplicable error as to each thing by them done and in each thing by them contended for. In short, petitioners notwithstanding the decision of the learned Chancellor that they might not dismiss without prejudice defied the Chancellor to do his worst. So that therefrom when he so did, the petitioners might appeal to the Supreme Court as from a final judgment and the final judgment having been rendered solely because petitioners would not do that which the law gave them time and place to do, we assert that having gambled and lost they may not impose upon this Court the duty to hear again when petitioners behaved as they did. In short, with deference, petitioners must have had a powerfully weak case to be unwilling to submit on its merits to a Chancellor who had been as conservative as Chancellor Neville and not to gamble upon a reversal of a final judgment which petitioners made requisite by their conduct. This Court does not sit to rectify where those who invoke its jurisdiction have been thus neglectful and averse to law conformity.

Further, petitioners say (Brief, 47):

> "Any consideration of whether the Petitioners were denied due process of law, therefore, must proceed on the assumption that the trial court committed error in refusing to permit Petitioners to dismiss their State Court case."

This, we, with deference, challenge.

And counsel say, p. 48:

> "From that point on the chancellor was running in competition with the Federal actions and that fact was kept constantly before him by Petitioners and the constitutional rights claimed by Petitioners must be judged in the light of the fact that the actions of the State Courts were taken with full knowledge that those actions would, and did, impinge upon the jurisdiction of the Federal Court."

The declaration that the Chancellor was proceeding with undue haste is untrue in fact for there is absolutely no evidence whatsoever thereasto in this record. If it be (whereof later) that the District Court did have jurisdiction, still the Chancery Court in virtue of its jurisdiction had a right to proceed as it did, duly and properly, and to render its decree in due course. Compare *Moore* v. *Pate*, 39 Fed. 2d 616, Certiorari denied, 282 U. S. 853, 75 L. Ed. 755. This Court reiterated the well-established rule in *Kline* v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226, 230:

> "Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. * * *".

Commonwealth Trust Co. v. *Bradford,* 297 U. S. 613, 80 L. Ed. 920; *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 86 L. Ed. 100.

It is perfectly obvious that petitioners in virtue of these Federal court suits, No. 270, et al., could not enjoin the proceedings in the State Court under Judicial Code Section 265.

Therefore, we, with deference, submit petitioners for these reasons had no right to dismiss and the decision of the State Court thereasto was appropriate, but if inappropriate, involved the violation of no Federal rights. Rectification may not be here wrought.

II

Petitioners next complain (Brief, 49):

> "In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation."

Our response thereasto is divided into two parts:

(a) The State may admeasure the right to appeal at pleasure. Such action constitutes no Federal violation. In Mississippi, appeals were by law allowed from assessment to all persons other than railroads. To them no appeals were granted. Invocation of the Fourteenth Amendment was made but denied by Mississippi's Court. Compare *Y. & M. V. R. R. Co.* v. *Adams,* 77 Miss. 765, 779. Appeals are purely statutory. Compare *Keeton* v. *State,* 197 Miss. 11, 19 So. 2d 477; 4 C. J. S., 61; 2 Am. Jur., 847.

As to interlocutory appeals, Mississippi narrowed its statute so as that it presently reads: (Section 1148, Mississippi Code, 1942):

> "An appeal may in sound discretion be granted by the chancellor in term time, or in vacation, from any interlocutory order or decree * * * or when having sustained or overruled a demurrer or motion he may think an appeal proper in order to settle all the controlling principles involved in the cause, or in exceptional cases to avoid expense and delay; * * *".

Obviously that sought by Petitioners was not thereunder authorized and yet they seek to commandeer Mississippi's judicial remedies to serve their ends, notwithstanding the public policy of Mississippi to the contrary.

Compare *Lott* v. *Windham,* 191 Miss. 849, 4 So. 2d 342, where it is said:

> "The demurrer raised and the interlocutory decree thereon adjudicated merely a procedural matter (Section 396, Code 1930) and an appeal therefrom not only would not settle all controlling substantive principles involved in the cause, as contemplated by Section 14, Code 1930, but, indeed, none at all. The appeal therefore must be dismissed."

Citing many cases, especially, *Liberty Trust Co.* v. *Planters Bank,* 155 Miss. 721, 124 So. 341. Compare *Universal Life Ins. Co.* v. *Keller,* 197 Miss. 1, 17 So. 2d 797.

Compare *United States Alkali Export Association* v. *United States,* 325 U. S. 196, 89 L. Ed. 1554, 1560:

> "It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such

cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. (Authorities). The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. Roche *v.* Evaporated Milk Asso. supra (319 U. S. 30, 87 L. Ed. 1192, 63 S. Ct. 938), and cases cited; and see Cobbledick *v.* United States, 309 U. S. 323, 84 L. Ed. 783, 60 S. Ct. 540."

That thus vehemently contended for by petitioners is so obviously improper as to be cause of comment. Petitioners well knew no such appeals were permissible and yet petitioners would have this Court reverse the Supreme Court of Mississippi for conforming to the express terms of an explicit statute.

(b) Petitioners contend impairment of constitutional rights by:

> "* * * Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation."

The matter of threats has been hereinabove disposed of, but there remains the alleged insistence of petitioners' rights in the District Court. Apparently petitioners would have this Court to assume that the District Court in these four suits had unquestioned jurisdiction whereasto there might be no objection raised but note

1. As to twenty acres of the land in controversy the citizenship, under petitioners' theory, was not diverse and, therefore, as to these twenty acres, the suit, No. 398, Chancery Court, and those parties interested in these 20 acres have no recourse to an adjudication settling their title and vouchsafing them royalty accruing over many years, other than through an adjudication in a State court. Therefore, the Federal Court was not able to administer complete justice in one suit.

2. But as to the remaining acreage petitioners advise this Court that they had "beaten back" all attempts at dismissal, but they did not advise this Court that presently this jurisdiction is again in issue under these facts.

Respondents called attention to *Veal* v. *Thompson*, 138 Tex. 341, 159 S. W. 2d 472, wherein the effect of unitization upon mineral ownership is adjudged. Mississippi has almost uniformly followed the Texas decisions. Compare *Stokely* v. *State*, 149 Miss. 435, 115 So. 563; *Merrill Engineering Co.* v. *Capital National Bank*, 192 Miss. 378, 5 So. 2d 666; *Koenig* v. *Calcote*, 199 Miss. 435, 25 So. 2d 763.

After the overruling of respondents' motion to dismiss the District Court cases by Judge Mize in March, 1946, the Circuit Court of Appeals of the Fifth Circuit decided *Keegan* v. *Humble Oil & Refining Co.*, 155 Fed. 2d 971, on June 13, 1946, rehearing denied July 23, 1946, and specifically approved the Texas rule as to indispensible parties under unitization agreements.

The Circuit Court of Appeals also reversed Judge Mize in *Calcote* v. *Texas Pacific Coal & Oil Co.*, decided July 31, 1946, 157 Fed. 2d 216, Certiorari denied November 18, 1946, 328 U. S. (No. 1) 29, 91 L. Ed. 80; Rehearing denied December 9, 1946, 328 U. S. (No. 1) 30, 91 L. Ed. 242, showing the absolute want of jurisdiction in the Federal Court in a diversity suit involving, if you please, a reformation of a

contract whereunder all parties participating in the ownership were uniformly bound without making those parties who were citizens of Louisiana and Texas parties thereto in any way.

This matter is set for re-argument before Judge Mize, on September 29, 1947. That which Judge Mize, before these decisions, assumed to do was merely to hold that he might frame his decree so as not to affect those persons holding those mineral interest who were consciously omitted by petitioners.

3. Herein Cause No. 398 in the Chancery Court was pending and thereasto those things shown in the record had been done, and with that cause thus pending petitioners assumed to file these four suits in the district court, and having thus done assumed to argue that the jurisdiction in the district court had become exclusive of the power in the chancery court to proceed. In petitioners' contention there are manifold errors.

a. That sought was not so in rem as to make the jurisdiction of either the State court or the Federal court exclusive one of the other, but that these two suits could so operate, one in one court, the other in the other court, as that both in due course could be brought to final judgment, the one wherein the final judgment was first rendered controlling as to what should be the judgment in the other. Compare *Kline* v. *Burke Construction Company,* 226 U. S. 226, 67 L. Ed. 221; *Lyon Company* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871; *Moore* v. *Pate,* 39 Fed. 2d 616, certiorari denied 282 U. S. 853; 75 L. Ed. 753.

b. The jurisdiction of the Federal court in a matter of this character is not in any way exclusive and in no way deprived respondents of those rights in Cause No. 398

vouchsafed to them by the laws of Mississippi, and petitioners could not by any act done in these Causes Nos. 270, et al., divest or impair the right of these respondents thus to litigate in Cause No. 398, conforming therein to that which was lawful under Mississippi's jurisprudence, for to this land thus situated in Mississippi, Mississippi had a peculiar sovereignty, and one in this aspect, with deference, quite exclusive of the jurisdiction of the United States, the district court being substantially nothing but another State court. *Angel* v. *Bullington, supra.*

4. As to petitioners allegation as to the improper calling of the May term of the chancery court, petitioners did not—as they could not—introduce a single scintilla of evidence that the chancellor did otherwise than he should in convoking a special term for the disposition of litigated cases when he was free from judicial burdens in other counties. In short, petitioners here charge that Chancellor Neville called this May term in such a wise as that he thereby impaired the constitutional right of petitioners under the 14th Amendment by the date at which this term was called. In short, the contention is that an upright judge—presumed so to be conclusively until contrary is shown—so assumed to prostitute his functions as that he improperly assembled his court to do an illegal deed, and in its ultimate analysis on this aspect, there is that whereto certiorari is herein demanded, without a scintilla of proof that the Judge so did, or would have so done, the petitioners lugging in the letter under confidential cover to all counsel, stating what he thought to be his problem, asking their suggestions thereasto and assuring all that they would be protected in his court. Of such a judge it is pretended that he called this May term to deprive the petitioners of that which to them was granted by the Constitution of the United States, superceding thereasto all State authority.

The implication of the granting of such a writ would *per se* be so serious as we submit to require its refusal. Authorities *supra*.

Note that said on pages 53 and 54 of petitioners' brief:

> "It is clear that if the chancellor had permitted the state court litigation to go on to the regular time of trial on the second Monday of July, the federal court would have completed the trial of the actions on their merits. What the state court did, therefore, *was done deliberately* and with full knowledge of the effect such action would have on the petitioners in their effort to *obtain a trial in the federal court.* • • •
>
> "This forcing of the State court case to trial out of its regular order under these circumstances and in direct disregard of the federal rights so earnestly presented by petitioners constitutes a direct impingement upon the jurisdiction of the federal court which was proceeding with petitioners' federal actions."

We cannot too often iterate or too strongly condemn the statements made by petitioners as to what might have been but was not, and are prone to recollect as to petitioners' case that not a single allegation is realistic. The best is a mere figment of the imagination invoked to bolster up. For petitioners, the saddest word of tongue or pen, it might have been, but herein was not and never will be. Substantially that asked is certiorari to relieve petitioners of a fraud, claimed in petitioners' brief to have been perpetrated by the Chancellor in calling a special term of court. Fraud must be both pleaded and clearly proven. It is never presumed. *Harris* v. *Godbold,* — Miss. —, 21 So. 2d 149.

5. Petitioners' forebears had dwelt in Jasper County through several generations and in that county at the time of this trial they had their blood kin to whom they were in no sense strangers, and they well knew that their kinsmen would not be disloyal to them. These petitioners are not

strangers to Mississippi. They had their origin therein and were but temporarily removed, and may not as to their mother state, we submit, make such unjustified claims as to condemn her courts.

6. Respondents protest against the utilization of the characterization of this adjudication "a farce". Petitioners knew precisely what they were going to do before the case was called and knew that if the Chancellor acted with that mandatorily required by the decisions of the Supreme Court there would be a dismissal of this bill with prejudice. Petitioners may not mislead this court by this cry of threats when what they were going to do was to them well known and that which they are herein doing is but attempting to color favorably their act in withdrawing. We say this with deference, but Mississippi, as above shown, had the right thus to prescribe, petitioners so knew, so expected, and were not disappointed, except they did badly misjudge what is the law in Mississippi on this score.

7. We have examined every decision cited by petitioners in their brief, and save where the same are specifically referred to herein we have found not in any of them any conflict with that wherefor we herein contend, and to save prolixity have not adverted to them.

8. Advert to counsel's brief, page 55, where it is said:

> "• • • The chancellor was fervently importuned to proceed with the case by the representation of counsel that the state court had exclusive jurisdiction—see e. g. the statement of Mr. Green at page 73 of the Appendix: 'We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court.' "

Turn to the Appendix, page 73 where that thus said is shown:

"By Mr. Green:

"On behalf of Gulf Refining Company we have in this (R. 857) original suit interposed a cross bill. We want to be perfectly fair and frank about this. We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court. We are ready so far as the Gulf Refining Company is concerned to go on with this case and have it determined."

No other counsel went further and that whereto we made reference was to the decisions by the Circuit Court of Appeals hereinabove adverted to, and wherein as shown, Judge Mize had been reversed wherein petitioners had consciously omitted all residents of Louisiana and Texas who were indispensible parties defendant and in addition, had been wholly unable even on that basis to formulate a bill whereunder they could claim relief as to 20 acres of this land. We repeat without fear of successful contradiction the precise claim which we made before the chancery court, and which was reiterated in the supreme court of Mississippi thus, after citing the court of appeals decision:

"So that when appellant urges that the federal suits should go forward, with deference, he is misstating the applicable conditions, for under these controlling decisions postdating Judge Mize's ruling in this case, that is an impossibility."

III

Petitioners assert:

"In Proceeding to Judgment Against Petitioners on Exparte Hearing at a Time When the Case was not Triable because of the Absence of Necessary Parties."

Answers thereto are:

(a) This was exclusively a state question and so determined by the chancellor and the supreme court. With

deference, we deny that process had not been served on the two minors, Claudies and Paul Ellis Newell, but assuming that they had not been thus served, the answers are:

1. Petitioners could not complain of an error made in favor of Claudies and Paul Ellis Newell under Section 3404, Code of 1930, Section 1988, Code of 1942:

> "• • • and one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case."

Compare *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 89 L. ed. 1725. Furthermore, in *Posey* v. *Bank of Philadelphia*, 92 So. 840, 130 Miss. 530, 95 So. 134, 130 Miss. 825, reversing the prior rule, decrees were made several in Mississippi so as that the former rule, void as to one, void as to all, forever disappeared, it having been, with deference, initially ill considered, our contention to the contrary in the *Posey* case notwithstanding.

2. These petitioners against whom the decree was rendered, at their own invitation may not when they obtain that wherefor they expressly bargained, assert that that given these Newells was not to the Newells still due. It would be strange indeed to visualize the Newells petitioning this court for certiorari to reverse a decree in their favor wherethrough they would as soon as it became final have the vouchsafed royalty whereasto they have been actively litigating since 1944. No person other than the Newells were in any wise affected by their status and if, which we deny, petitioners may assert the rights of these parties, which rights could not affect this decree further than they individually were concerned, *quoad* all other persons the decree was perfectly proper and should be affirmed. Under Mississippi practice any defense successfully made by one defendant inures to the benefit of all others, and would require

the dismissal with prejudice in favor of the Newell minors. *Soria* v. *Stowe,* 66 Miss. 615, 6 So. 317; *Kelly* v. *Brooks,* 57 Miss. 225.

We want to stress the anomaly of a petition for certiorari under federal rights predicated upon the determination by a local court that the cause was then triable, and upon such announcement being made the parties so petitioning for certiorari solemnly assuring the court that in order to stand upon their right to dismiss without prejudice they were withdrawing from the courtroom. With deference, this claim is not quite consistent with the duty owed to this court.

IV

Petitioners claim:

> "In Proceeding to a 'Trial on the Merits', Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal with Prejudice After Petitioners Declined to Proceed Further."

whereto respondents make answer:

(a) As hereinabove set forth, not repeated to save prolixity.

(b) When petitioners concede that on their refusal to hearing the court was obligated to render judgment of dismissal with prejudice and so did, then with deference all else became *quoad* petitioners absolutely moot. Compare that said substantially in this aspect by Mr. Justice Smith, Appendix page 82:

> This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated

> against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become res adjudicata. Van Zandt *v.* Town of Braxton, 149 Miss. 461, 465, 115 So. 557; Watkins *v.* State Board, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see also Griffith's Chan. Pract., Secs. 263, 363, 571, 624."

and with the concession that it was obligatory upon the Chancellor to do that which he did do, and having so done, petitioners were without right to obtain in this court under certiorari anything that would subvert that which was appropriate under Section 2 of this decree. We iterate that petitioners got exactly what they bargained for on their demanded appeal to Mississippi's court and therein found that properly Mississippi's supreme court affirmed without passing on at least four independent state questions whereover Mississippi's court had exclusive jurisdiction, and whereasto this court was without power of review. Authorities *supra.*

(c) Under Mississippi's practice if the right result is reached even though erroneous evidence be introduced, or the wrong reason therefor given, Mississippi's court will affirm. Compare *Thomas* v. *State,* 61 Miss. 60, wherein the appellant took the stand, said what happened, and under that which he said he was due to be executed for murder, and the supreme court affirmed, notwithstanding technical error. We do not concede in this cause any errors, but so obviously the right result was reached that even though there might be such, certiorari here would not apply, for Mississippi's supreme court has not up to this date passed upon all of those state questions whereon it could render an affirmance, and with deference to petitioners, there is not assigned a single error which as we see it calls for serious consideration by this court.

(d) Counsel claims:

> "What this court faces is the failure of the trial court and the Mississippi supreme court to accord to petitioners rights given under rules of practice which are admitted to exist. That is entirely another matter."

With deference, we controvert that either the chancery court or the supreme court did not vouchsafe to petitioner everything whereto petitioners were entitled under this record under the state law, but if it be that Mississippi's supreme court was so ignorant as that it could not consistently administer its own law with deference the remedy is not to be certiorari here, but rectification at home. Compare *Tracy* v. *Ginzberg,* 205 U. S. 170, 51 L. Ed. 755, 759, wherein it is said:

> "* * * The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property."

With deference, we resent the statement that Mississippi's court did not admirably administer that system of laws there existing, accurately admeasuring to petitioners precisely what they were entitled to under Mississippi's jurisprudence. They had a full opportunity to argue this case before the supreme court. They so did. They fully briefed it, they reargued in their suggestions of error. They, contrary to the rules of Mississippi's court, then assumed to dictate under a motion to correct the judgment on June 2, 1947, and that, too, was overruled. Petitioners have received every consideration whereto they were entitled and when they chose to have this bill dismissed with prejudice rather than to confide to Mississippi's court the

truth or untruth of their contentions, they may not complain, for their election was made by them and not by Mississippi, and Mississippi may not be, under the 14th Amendment, penalized for that by petitioners voluntarily done.

V

Petitioners claim:

> "In Awarding Judgment Against Petitioners on the Cross-bill of the Ridgways."

whereto respondents answer:

(a) Those hereinbefore made.

(b) The chancery court did not grant affirmative relief on the Ridgway cross-bill. The sole relief granted the Ridgway group by the Chancery Court was under clause 2 of the decree.

(c) We admit, as is perfectly obvious, that the supreme court did advert to the Ridgway cross-bill in considering whether or no petitioners had the absolute right to dismiss this entire suit, and the conclusion of the supreme court thereasto is eminently accurate.

(d) Petitioners say on this petition for certiorari, repeating a rejected contention before Mississippi's supreme court that no service was ever had upon petitioners under this cross-bill. In Mississippi's supreme court it was there solemnly said, and is here reaffirmed by counsel at the bar, that this cross-bill, along with the answer whereof it is a part, was lawfully served upon Judge Lamar F. Easterling at a time before other counsel became connected with this litigation, and Judge Easterling before a Mississippi court, and doubtless here will do the same, affirmed that he would not controvert in any way the declaration of counsel

for respondents that service had been lawfully made. The statute of Mississippi thereasto provides:

> "* * * but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time, unless the court, or chancellor in vacation, for cause shown, extend the time for answering."

This statute does not require formal process or filing, and the supreme court of Mississippi regarded that done as appropriate under Mississippi statutes. However, with this cross-bill unquestionably in the record, petitioners made a motion to dismiss, not the original bill, but the entire suit, including this cross-bill of the Ridgeways, and when they so did that presented to the court was what the court should do with this cross-bill actually filed claiming affirmative relief. Having thus moved to dismiss it as part of the suit, petitioners are not privileged to say that their motion so thus embracing specifically this cross-bill did not bring to the judicial mind that therein embraced. Whether it so did or not was under Mississippi law a question of Mississippi jurisprudence and when a motion is made (there being no special appearances in Mississippi) the party making it becomes subject to the jurisdiction of the court. *Miss. Cottonseed Products Co.* v. *Champion,* — Miss. —, 29 So. 2d 684; *Maloney* v. *Tatum,* 199 So. 129, 134 So. 714; *Express Co.* v. *Diggs,* 165 So. 292, 174 Miss. 650.

So when with the cross-bill in the record and the Ridgeway group claiming relief thereunder, the petitioners sought its dismissal they were bound by its existence and moving for dismissal were obligated to integrate its effectiveness into that whereasto they sought relief. To contend that this cross-bill was "a nullity" (compare *Calcote*

v. *Taxas Pacific Coal & Oil Co.*, 157 F. 2d 216, where precisely similar cross-bill was filed) when they made a specific motion to embrace it, along with the remainder of the suit, puts petitioners in the awkward position of inconsistency, to say no more.

We have examined all of the authorities cited by petitioners, but we have not found one in which when a motion was made by a petitioner to dismiss that full implication was not vouchsafed. In short, in many instances a motion to dismiss on the merits has operated as a waiver. Compare *Big Vein Coal Co.* v. *Read*, 229 U. S. 38, 57 L. Ed. 1056.

As to effectiveness of this cross-bill, it is similar in a large measure to that filed by the Gulf Refining Company, and was adjudged by Mississippi's court under Mississippi's practice to be an operative pleading wherefrom, with deference, petitioners may not escape, for they voluntarily made this motion and having so done complete waiver was wrought. Compare *Calcote* v. *Texas Pacific Coal & Oil Co., supra,* whereon the District Court granted relief on such cross-bill.

VI

Petitioners claim:

> "In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill was Overruled and When Petitioners had Settled With Gulf."

whereto our responses are:

(a) As to the alleged settlement with Gulf, with deference, as noted hereinabove, the Gulf Refining Company gave petitioners full notice of that wherein the Gulf Refining Company contended (App. p. 73).

(b) For $50,000.00 cash paid, the petitioners executed to the Gulf Refining Company a protective lease wherein Sec-

tion 14 as quoted *supra*. Furthermore, Tidewater Association Oil Company obtained a similar lease. Both of these companies held under leases precedently obtained and in no way surrendered. As to such former lessors, both of these oil companies felt obligated to do that requisite to vouchsafe these original lessors that which was covenanted to be paid to them. As lessees in possession, these oil companies were probably subject to certain disabilities. Compare *Newman* v. *Mackin*, 13 Smedes & M. 383; *Griffin* v. *Sheffield*, 38 Miss. 359; *McNeeley* v. *City of Natchez*, 12 Fed. (2d) 3, cert. den. 47 S. Ct. 767, 71 L. Ed. 1339. But counsel is wholly in error when he states that the Gulf Refining Company in any way abrogated its obligation to its initial lessors. For them and in deference to them it has fought, and as stated by petitioners, "led the fight in the district court" (R. p. —) which very obviously indicates that no settlement had been made. The petitioners made a specific contract *quoad* Gulf under which they could not have any royalty until they had established in Cause No. 398, or by compromise, title, and thus to do there was an implied if not an express obligation. And when petitioners as at this point seek to impress the court with there being no conflict at any time as to Gulf Refining Company or the Tidewater Associated Oil Company they are in serious error, for they have consistently from their own viewpoint fought the fight for those to whom they assumed they owed fealty.

Counsel then say as to this demurrer (Br. p. 63):

> "• • • The point here made is that the action of the Mississippi state court on the cross-bill after overruling the demurrer did not square with accepted Mississippi practice or with the constitutional requirements of due process of law."

Breaking this down, first as to requirements of Mississippi law, it will be noted that petitioners admonished that they

might not try this case on the merits if they would reserve their right to challenge in Mississippi's supreme court the rectitude of the Chancellor on his ruling to dismiss, chose to have that dismissal entered pursuant to well established rules, and having thus elected that rendered requisite under the Film Transit case, quoted *supra,* was not to overrule the demurrer, but to dismiss with prejudice. Thus petitioners got precisely what they bargained for. But going one step further, petitioners withdrew from Mississippi's court and protested in no uncertain terms that they would take no part further in this cause, and that now by petitioners asserted is that they overspoke themselves—that they did not mean, if you please, what they said, and that when they withdrew they did not intend to go way off and not come back, but they intended to sojourn at a respectful distance so that they might at their pleasure forthwith return and file an answer to this cross bill. With deference, petitioners are not toting fair with the Court in this contention. The chancery court had a right to believe that petitioners meant precisely what they said, and what they said was (Br. p. 75)

> "Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room."

Here plain English was being used. Mr. Buchanan specifically told them before they withdrew that evidence was going to be introduced and when they withdrew they withdrew, and both Mississippi's courts were entitled to take them at their word and so did. On this question of fact as to what was meant by an oral statement in open court to the court itself is not a question whereasto certiorari is appropriate for the United States to subordinate a judgment of a sovereign state. Compare *U. S.* v. *Johnson,* 327 U. S.

106, 90 L. Ed. 562, 566. But go one step further and assume that these foregoing points are not well-taken, and that under Mississippi practice petitioners had a right to raise this question, we still aver that Mississippi's court acted properly within Mississippi's laws.

Counsel appropriately refer to Section 1289 of the Mississippi Code (Br. p. 64):

> "It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer * * *"

and to Section 310 of Griffith's Chancery Practice, but note that therein said not quoted by counsel:

> "* * * If the demurrer be overruled the court will require that in a reasonable time all the circumstances considered, the defendant shall file his answer, the considerations being much the same as those controlling when a defendant under motion applies for additional time. But our court has said that when a demurrer is overruled and there is no application for time to answer, and no suggestion of any cause for delay, it is proper to require an answer *at once*, and none being filed to take the bill as confessed and decree accordingly; and certainly the latter is the rule when the defendant expressly declines to plead further."

Herein, with the declaration of respondents ringing in his ears that they were withdrawing in order to render possible the judgment they sought so that they might seek review of what was being done, the chancellor, we submit did precisely what petitioners expected, precisely what they sought to have him do, and are not now in a position to complain thereof. They wanted expedition in jurisprudence, and when the demurrer was overruled and the chancellor had been advised that these parties would not be back, what

was the use of waiting. *"Lex cogit neminem ad vana seu inutilia,"* Broom's Legal Maxims, p. 252.

In short, with petitioners declaration that for determination by the chancellor under Mississippi practice was a question of fact, nothing more, conceding that he had to determine what was a reasonable time. Compare *Bud Hall* v. *Eastman-Gardiner Co.*, 89 Miss. 588, 43 So. 2. But certiorari is never granted to determine questions of fact. Compare also Griffith's Chancery Practice, Section 262, wherein is said:

> "• • • If however upon the overruling of a demurrer, the defendant makes no application to amend, or if on a motion to test the sufficiency of an answer it is adjudged insufficient in law, and no leave to amend is applied for, it is the usual practice to proceed to a final decree on the bill without the formality of taking a decree pro confesso, the facts to be recited in the final decree. Indeed, it has been held that even in cases of total default it is not essential to take a formal decree pro confesso if the record shows that it would have been allowed, and the final decree is supported by the bill. In other words, if the state of the record is such that a decree pro confesso was proper, the failure to formally take it is an irregularity only and is not fatal to the final decree."

Compare *Cole* v. *Johnson*, 52 Miss. 94; *Hambrick* v. *Jones*, 64 Miss. 252, 8 So. 176.

(b) Under the Federal Constitution under the cases hereinabove cited as to this matter the decisions in this court are uniform—that no wrong was done petitioners.

Compare *Hammond Packing Company* v. *Arkansas, supra*, wherein a judgment for $10,000.00 was rendered for precisely this course of conduct under a Arkansas statute, and the judgment was held perfectly valid under the Federal Constitution, and the fact that the parties against whom it

was rendered might have a defense on the merits was immaterial. They were subject to an adverse judgment solely for such refusal to answer.

Counsel say (Br. p. 65):

> "None of the requirements of this statutory scheme were observed by Gulf or enforced by the court in acting on the cross-bill."

With deference, as held by Mississippi courts, every requirement was conformed to. Having lost their case on two separate grounds at least, petitioners seek to grasp that which may return them to the position which they voluntarily abandoned. Herein, as above noted, petitioners specifically declared they had "burned" their bridges behind. Frankly, we are unable to comprehend the meaning thereof unless they did precisely what they said, and if they thus burned it was quite impossible under their plan to retrace and re-litigate for, and when they thus did then they would thereby have foregone that upon which they claimed to have exclusively relied, namely, the right to dismiss without prejudice. Under this cross-bill petitioners would then have tried this cause in the chancery court of Jasper County, a thing which they voluntarily determined to forego, and if they initially so did as to the issues of fact actually joined, it is inconceivable that they would have again joined issue when this demurrer was overruled, for according to petitioners, issue was already joined, and on the original bill, the case ready for trial, and it is fundamental that the trial of an original bill may not be, under Mississippi practice, delayed by the cross-bill. Coordination is requisite to presentation in this wise. Compare *Griswold* v. *Simmons, et al.*, 50 Miss. 137:

> "The case for this court, therefore, is narrowed down to trivial points of practice, no way involving or affecting the merits of the controversy or rights of the parties.

"1. That the original cause proceeded in disregard of the cross-bill.

"A cross-bill does not stay proceedings in the original cause, except by order of the court, upon motion and notice. 2 Barb. Ch. Pr., 134, 2 Danl. Ch. Pr., 1656."

Petitioners say (Br. p. 66):

"The presumption is that petitioners would have answered the cross-bill because they were litigating every single issue."

But that is precisely what petitioners apparently declared they were not doing. They withdrew from the courtroom to litigate one issue and there can be no presumption as to what "might have been" in the face of a declaration of fact that it would not be. Presumptions disappear in face of facts. Compare *M & O. RR Co.* v. *Holt*, 62 Miss 170; *N. O. G. N. RR Co.* v. *Waldern*, 133 So. 241, 160 Miss. 102; *Mobile and Kansas City RR Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226; *Tot* v. *U. S.* and *U. S. of America* v. *Delia*, 319 U. S. 463, 87 L. Ed. 1519.

20 Am. Jur., Section 160, page 164, says:

"Stated differently, a presumption is rebutted when facts to the contrary are established."

In their discussion that which petitioners overlook is that the original bill had not been dismissed and that this was a cross-bill whereunto they had demurred, and on the issue joined between the original bill and the answer it was requisite that the case go forward, not to be delayed by the cross-bill, and our position unequivocably is that it does rest upon valid, non-Federal grounds, namely, those enumerated, plus the voluntary election of petitioners to withdraw. Compare *Hammond Packing Company* v. *Arkansas, supra.*

Petitioners declare (Br. p. 69):

"Gulf did not resist petitioner's motion to dismiss."

But see petitioners declaration as to the machination of Gulf (Br. p. 70):

> "Thereupon one of the attorneys for Gulf arose and expressed the idea that the chancery court had exclusive jurisdiction to adjudicate the case and adverted to the fact that Gulf had interposed a cross-bill."

See, also, what is said on this point by the Supreme Court of Mississippi, Appendix, 86.

We advert to the contract between the oil companies and petitioners whereunder petitioners specifically contracted that it would be a condition precedent to any recovery of royalty that petitioners established their right in Cause No. 398, or by compromise, and with this specific provision in that contract contained, petitioners saw fit to demand that in accordance with Mississippi practice there be a dismissal with prejudice in Cause No. 398, and there so was, so that consciously petitioners put themselves in a position under the express contract, Clause 14, whereby the chancery court in Cause No. 398 determined no right of royalty could to petitioners accrue, and petitioners had contracted that such an adjudication would be conclusive. It is true that petitioners did file in the District Court a count seeking to reform Section 14, but the reformation sought went only to the extent of integrating, instead of "the chancery court of Jasper County," "any competent court." Confessedly, the chancery court of Jasper County was a competent court and having thus adjudicated under petitioners contract all that was involved would have been the simple interpretation of this contract whereinto petitioners entered and which would preclude by an express contract any relief to petitioners in virtue of that by them

specifically done. The interpretation of a plain contract is not a federal question involving no impairment within the contract clause.

Petitioners take the remarkable position that an amendment to Gulf's cross-bill was requisite to set up therein the acquisition of title from petitioners when petitioners well knew that Gulf was relying upon its original leases, and specifically reserved the right to attack just as fully and completely as if the lease had not been executed, and Gulf did that which it specifically reserved the right to do, and openly contracted that it would do, and for this contract petitioners accepted $50,000.00.

VII

Petitioners claim:

> "In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case not Justifiable Because it Had Become Moot."

whereto respondents answer:

(a) Those things hereinabove set out, not repeated to save prolixity.

(b) This contention rejected by the Supreme Court of Mississippi, Appendix, 82.

(c) Petitioners say (Br., p. 72):

> "*Gulf of course endeavored to retain some fancied right* to continue the pending litigation."

The right was actually retained and was not a mere fancied right. Note Clause 14, Appendix 50, 52, whereon we stand firmly and demand the contract rights there prayed for.

(d) Petitioners overlooked that at no time did the chancellor allow the original bill to be dismissed without preju-

dice. He dismissed it with all parties in court with prejudice, and might we say, petitioners caused this to be done, and when they did, where were they under the contract embodied in the 14th Section?

VIII

Petitioners contend:

> "In Awarding Judgment Against Petitioners on Cross-Bills Which on Their Face Showed No Right to Relief and to Which a Demurrer had Been Interposed; Especially After the Original Bill Has Been Dismissed."

whereto respondents reply:

(a) Those things hereinbefore set out.

(b) Note the astounding claim, with deference not true, that a failure of respondents to deraign title under a state statute might constitute a violation of the 14th Amendment when the state court held the local statute in all things complied with.

(c) The original bill had not been dismissed. Note that said by petitioners (Br., p. 87):

> "The original bill was never dismissed by the court below, and the court below was never called upon to rule on the retention of the cross-bill after the dismissal of the original bill."

It was really a State question whether or not this demurrer should be sustained, and unquestionably Gulf had a right to confirm its leases, and did it not have the right to confirmation, it had a right to recover for the expenditures made in drilling the well. Whether there should be an affirmative pleading or a defensive pleading is not in

any way, so far as we can ascertain passed on as a matter whereon this Court would grant certiorari.

> "• • • It was important to Gulf Refining Company to know which was the valid title, that of the defendants, or that of the complainants. In order to be amply protected, it asked not only that complainants (petitioners) claim be dismissed, but also asked that its leases from its codefendants (respondents) be confirmed as against the claims of the complainants (petitioners)."

This quotation is from respondents' brief in the supreme court of Mississippi which was adopted as appropriate by that court.

In Sec. 380, p. 385, of his Chancery Practice, Judge Griffith, in speaking of the requirements of a cross-bill, says:

> "• • • But when pleaded with and as a part of the pleading containing the answer it is not required that the cross-bill shall contain a repetition of the averments contained in the answer; the allegations of the answer may be made a part of the cross-bill by any statement appropriate to that end, as for instance—'the cross-complainant hereby makes all and singular the denials and averments of his foregoing answer a part of this cross-bill to the same extent and as fully as if repeated herein.'"

citing *Phoenix Insurance Co.* v. *Smith,* 95 Miss. 352, 48 So. 1020. Compare *Buckingham* v. *Wesson,* (1887) 54 Miss. 526; *Vaughan* v. *Hudson,* (1882) 59 Miss. 421; *Carter* v. *Harvey,* (1890) 7 So. 286.

The cases cited by petitioners are not applicable to the constitutional question here at issue. However, advert to *Dewees* v. *Dewees,* 55 Miss. 315, and note that while it may be true that petitioners may have offered to refund to Gulf that expended in oil explorations, this might not have been done under Mississippi practice without a specific

prayer for judgment by Gulf to that end. This minor rule surely should not demand certiorari from this great Court.

Counsel claims (Br. 84):

> "• • • The failure of the Mississippi Courts to follow rules of practice concededly in force at the time under the circumstances here set forth constitutes a clear denial to Petitioners of due process of law."

Respondents deny that there was any failure thus to follow, but if there so were that herein done cannot in any aspect be imagined to be a violation of the due process clause. It would convert this Court into a harbor for the consideration of every type of question and emasculate this Court by compelling it to devote its time to that which was not in any way within the purpose of the Constitution and this court has been careful thus to do.

IX

Petitioners claim:

> "By the Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on by the Lower Court and Which Petitioners never had a Chance to Defend."

Whereto respondents say:

(a) Fully answered *supra.*

(b) Petitioners say, "petitioners were never given a chance to defend," but so cocksure were petitioners of their assumed rights that they voluntarily burned all bridges and stood upon that which was well established as proper practice in Mississippi, and petitioners cannot overlook the fact that at the time of the rendition of this decree every necessary party was in the chancery court of Jasper County, and each necessary party so thus being under fixed

practice of Mississippi hereto admitted by petitioners, that court dismissed the bill of petitioners with prejudice, and having thus so done there was left undetermined that portion of the litigation having to do with the cross-bill of the Gulf, remembering that the petitioners have conceded that confirmation and cancellation were substantially synonymous, and their original bill having been dismissed they are not in that aspect entitled to allege error nor are they entitled to allege error as to the confirmation, because they concede that thereby they were not hurt insofar as the Chancery Court was concerned, and when the appeal was taken as petitioners desired it to be to the Supreme Court, that court affirmed the decree below, and the reason therefor, with deference, so far as this certiorari is concerned, is quite immaterial, being upon a ground of local factors, Mississippi's Supreme Court deeming it so clear as not to require examination of other factors inherently integrated and left specifically undetermined, all of which must needs have been determined before, with deference, a Federal question could have been in any way originated. Author-*supra.*

Naught contained in *Saunder* v. *Shaw,* 244 U. S. 317, 61 L. Ed. 1163, is in any wise here applicable for therein (Br. 92):

> "* * * But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

But petitioners invited this Court in the chancery court and made their complete record, and in the Supreme Court, that court merely looked to one of the contentions of the

respondents and found that in virtue of that contention petitioners were not entitled to dismiss without prejudice in the Chancery Court, Mississippi's court, with deference did not go further than the authorities hereinabove quoted allow.

Petitioners claim (Br. p. 94):

> "They were invited into court to face one situation and held in default for not facing another situation with which they were not presented."

This, with deference, we catagorically deny. Petitioners made their motion to dismiss and upon being refused elected to stand thereon, claiming that this refusal to dismiss was improper, having invited the dismissal with prejudice by the Chancery Court, the Supreme Court was free to determine as a matter of State practice whether that decree thus invited should be affirmed or reversed. For affirmance, the State Supreme Court found adequate warrant in the local practice as to cross-bills, and so finding was thus obligated to affirm. In short, petitioners' claim thereasto is so palpably contrary to the decisions in this Court as to cast discredit upon the entire proceeding, for it never has been the rule that either the district court or the State court should halt orderly proceedings so that that being done might be subordinated to that which might be done in the other tribunal in proceedings in personam. We reiterate that said so effectively by Mr. Justice Smith, quoting Mr. Justice Griffith in his book on Chancery Practice (Appendix, 85):

> "* * * And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they

were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again."

X

Petitioners claim:

"By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-bills of Gulf Refining Company and the Ridgways Holding said Judgment to be Res Judicata as Between Petitioners and Defendants not Parties to Said Cross-Bills and as to Issues not Involved in said Cross-bills, and When This Point Was Not Involved in the Decision of the lower Court or Argued Before Said Supreme Court."

Whereto, our responses are:

(a) As hereinabove set out.

(b) If it should be, which with deference we deny, the effect of this judgment is for the court in which it is pleaded when it shall be pleaded, if it were true, which with deference it is not, that certain parties were not made parties, then the rule of Mississippi is that as to those parties thus circumstanced, the decree would be void. *Sivley* v. *Summers*, 57 Miss. 712, 730, approving Story Equity Jurisprudence, Sec. 4, page 27.

(c) We challenge the position that petitioners did not fully argue every possible view point to Mississippi's Supreme Court. The point made by counsel in the petition for certiorari that the Supreme Court has not passed on this contention is, with deference, inaccurate. In petitioners' Suggestion of Error, which should have been made a part of the record, almost in the very words here appearing every contention is found, and though thus made were not sustained by the Mississippi court. Compare Suggestion of Error, pages 54, *et seq.* And Petitioners cited substan-

tially the same authorities in the suggestion of error in the Mississippi court.

In addition to the foregoing, we call attention to the fact that petitioners gave bond for an appeal from the Chancery Court of Jasper County to the Supreme Court of Mississippi and the sureties thereon were: Lamar F. Easterling, George E. Shaw, Lester C. Franklin, Lester E. Wills and Ben F. Cameron; and when the Supreme Court affirmed this judgment, it rendered a judgment of affirmance and for cost recovery against petitioners and these five individuals, so as that presently the judgment in Mississippi's Supreme Court is against not only petitioners but the sureties as well. Only the petitioners sought certiorari. The sureties did not. Compare *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169, 76 L. Ed. 685. This certiorari is attempted to be taken, not from a Federal court but from a State court. Under the reasoning in the *Bunn* case, with deference, this Court may not take jurisdiction thereover.

If this Court shall determine jurisdiction was not properly invoked, it should dismiss under the *Bunn* case, but if the jurisdiction was properly invoked, then, with deference, we submit

In Conclusion

Petitioners say (Br. p. 105):

> "By the decision and judgment in this case these petitioners stand with the doors of the Mississippi Courts closed to them without having had the opportunity to produce their witnesses and develop their case on the merits."

But petitioners themselves closed the door under a valid rule of Mississippi practice, and we say, with deference, they did it intentionally, and having invited the error are estopped from questioning that which was requisite under Mississippi law.

Counsel say (Br. p. 106):

> "The merits of the case are not involved. The points made by us relate to procedure alone—to the machinery by which the merits are reached."

The points made by us relate to procedure alone—and confessedly state procedure wherewith counsel were obviously familiar and where that is true this Court will not feel called upon to relieve petitioners who for reason invite the decree, and having gotten it exercised the right of appeal, and find contrary to their judgment that the Chancellor was better advised as to Mississippi law than were the petitioners, and so being, no complaint may here be made.

Respectfully submitted,

JOHN E. GREEN, JR.,
R. E. WILBOURN,
IRWIN W. COLEMAN,
MAJOR W. CALVIN WELLS,
W. R. NEWMAN,
STONE WELLS,
W. H. WATKINS, SR.,
P. H. EAGER, JR.,
W. S. WELCH,
GARNER W. GREEN,
Of Counsel for Respondents.

WILBOURN & WILBOURN,
Meridian, Mississippi;
WELCH, COOPER & WELCH,
Laurel, Mississippi;
WATKINS & EAGER,
Jackson, Mississippi;
GREEN & GREEN,
Jackson, Mississippi.

APPENDIX A

N. L. Huddson, *Grantor*,

To

Mary Huddson, his wife, *Grantee*.

Kind of Conveyance, Deed of Gift.
Date of Conveyance, Jan. 23, 1880.
Is it properly acknowledged? Yes.
Date of Filing for Record, Jan. 23, 1880.
Record in Deed Book 20, Page 155.
Consideration, Love and Affection. Paid or not ——.
Description of Land Conveyed ——.
E. ½ of SE. ¼ Section 19, and SW. ¼ of SW. ¼ Section 20, and W. ½ of NW. ¼ Section 29, and E. ½ of NE. ¼ Section 30. All in Township I, N. Range 13. E. situated in the First District of Jasper County, Miss.

APPENDIX B

State of Mississippi,
County of Jasper:

Know all men by these presents:

That Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby Mae Mitchell, and N. L. Hudson, who represent and warrant that they are the sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased, late of Jasper County, Mississippi; and L. F. Easterling and L. C. Franklin, hereinafter caller "Lessor" (whether one or more) hereby grants to Gulf Refining Company, hereinafter called "Lessee," the exclusive right to explore the land hereinafter described for mineral indications, to drill and mine thereon

for oil, gas, sulphur and other minerals, and to produce and appropriate any or all of same therefrom; the right to use, free of charge, oil, gas and water from the land in conducting operations thereon and in treating to make marketable the products therefrom; the right to construct and use on said land telephone, telegraph and pipe lines and facilities for the transportation and storage of minerals produced therefrom, as well as salt water; the right to construct and use such canals and roads as are necessary for Lessee's operations hereunder; the right to remove from the land at any time any property placed by Lessee thereon, and all rights necessary to the full enjoyment of this lease; all, however, during the term and subject to the conditions hereinafter stated.

The said land is situated in First District of Jasper County, Mississippi, and is particularly described as follows, to-wit:

East half of Southeast quarter (E½ SE¼), Section 19; Southwest quarter of Southwest quarter (SW¼ of SW¼), Section 20; Northwest quarter (NW¼), of Section 29; Southeast quarter of Northeast quarter (SE¼ of NE¼), of Section 30; all in Township One (1), North, of Range Thirteen (13) East, comprising 320 acres.

For the purpose of calculating the payments hereinafter provided for, the superficial area of the land covered by the above description is estimated to comprise 320 acres.

1. This lease is effective as of the date January 1, 1940, and shall expire January 1, 1955 (hereinafter called "primary term") unless oil, gas or other mineral is being produced in commercial quantities or operations for drilling or production are being conducted on or from the above described land or any portion thereof on said expiration date of January 1, 1955, and shall continue in effect so long thereafter as such production is being had or operations for drilling or production is being conducted in accordance herewith.

2. Lessee may at any time execute and deliver to Lessor or to the depository hereinafter named, or place of record, a release or releases covering any portions of the land and

thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the land surrendered. Any notice, release, or communication to Lessor may be given to Lessor personally, or by letter addressed to Lessor, care of Lamar F. Easterling, 1406 Deposit Guaranty Bank Building, Jackson, Mississippi. The Deposit Guaranty Bank & Trust Company, of Jackson, Mississippi, is named as depository hereunder.

3. If prior to the discovery of oil on the land and at a time when Lessee is not actually engaged in drilling operations on the land, a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days is brought in on adjoining land and within two hundred (200) feet of any outside boundary of the land then held hereunder, Lessee shall, within a reasonable time, begin, and with reasonable diligence, prosecute the drilling of a well on the land then held hereunder in an honest effort to discover oil in paying quantities.

4. After beginning operations on the land, and prior to discovering any mineral in paying quantities thereon, Lessee may maintain Lessee's rights in effect for so long as it pleases, even beyond the primary term, by continuing such operations without lapse of more than sixty (60) days between cessation of operations on one well and the beginning of operations for drilling another.

5. After discovery of any mineral in paying quantities on the land, all of Lessee's rights shall remain in effect so long as any mineral is produced in paying quantities from the land; and if such production should thereafter cease for any cause after the expiration of the primary term, Lessee may maintain all rights hereunder by beginning reworking operations or additional drilling within sixty (60) days after such cessation.

6. After the discovery of any mineral in paying quantities, Lessee shall be exempt from loss or forfeiture of this lease in whole or in part, except after final judicial ascertainment that Lessee has failed to perform its duty hereunder, and thereafter Lessee shall have a reasonable opportunity to perform and prevent such loss or forfeiture,

and in event of final loss or forfeiture, there shall be reserved to Lessee all producing and drilling wells with forty (40) acres surrounding each well to be designated by Lessee.

7. Subject to and contingent upon the provisions of paragraph 14 hereof, Lessor shall be entitled to the following royalties: one-eighth (⅛) of the oil produced and saved and not used for fuel in conducting operations on the land or in treating to make marketable the products therefrom; one-eighth (⅛) of any waste oil from the land or coming on to the land from other sources, if utilized; on gas, including casinghead gas or other gaseous substance, produced from said land and sold for purposes other than the manufacture of gasoline, the market value at the well of one-eighth (⅛) of the gas so sold. If such gas is sold for the manufacture of gasoline therefrom, the royalty shall be one-eighth (⅛) of the amount realized from such sale. In the event said gas is used off the lease or in the manufacture of gasoline therefrom by Lessee, the royalty shall be one-eighth (⅛) of the market value of such gas at the well. The royalty for each well producing gas only shall be Two Hundred and No/100 Dollars ($200.00) each year until such time as the gas from such gas well shall be utilized in the manufacture of gasoline or sold off the land; on sulphur fifty cents (50¢) for each long ton marketed; on salt three cents (3¢) for each long ton marketed; and a reasonable royalty on any other mineral produced in quantities deemed by Lessee to be paying. These royalties are based upon the ownership of the entirety of the mineral rights by Lessor. If, in any event or at any time, Lessor owns less than such entirety of the mineral rights in any portion of the land from which any mineral may be produced, such royalties shall be paid only in the proportion that Lessor's interest in the mineral rights in such portion bears to the entirety of the mineral rights therein.

8. The oil royalty shall be delivered to Lessor at Lessor's option into storage tanks provided by Lessor at Lessor's expense on the land retained, or into any pipe line connected with the well; if Lessee provides such pipe line, Lessee may purchase such royalty oil at its posted market price for oil

of like kind and quality from the same field; if no storage tanks are provided by Lessor and there is no pipe line connected with the well, Lessee shall have the optional right to purchase the royalty oil at the market price at the well, or to sell such oil and to account to Lessor at the market price at the well.

9. Lessee shall bury its pipe lines below plow depth when requested by Lessor. No well shall be drilled nearer than two hundred (200) feet to the house or barn on said land without the written consent of Lessor, and Lessee shall be responsible for all damages caused by Lessee's operations other than damages necessarily caused by the exercise of the rights herein granted.

10. If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or the minerals in and under the same or assignment of rentals or royalties shall be binding on Lessee unless Lessee shall have been furnished thirty (30) days payment hereunder of such royalties with certified copies of recorded instruments showing the muniments of title. If six or more parties become entitled to royalties hereunder, Lessee may withhold payments thereof unless and until furnished with a recordable instrument executed by all of such parties designating an agent to receive payment for all.

11. If by reason of labor troubles at manufacturing plants, or as the result of exercise of rights by governmental authority, Lessee is delayed or hindered in obtaining material or equipment necessary in drilling or completing a well, or if as a result of war, flood, storm, fire, blowout, differences with workmen, requisition or order of governmental authority, Lessee is prevented from commencing or completing the drilling of any well or wells, then in any such event Lessee shall be relieved during the period of such delay or the continuance of such preventing cause from all obligations, either express or implied, in

this lease contained to commence or complete the drilling of any well or wells; and Lessee shall not be liable to Lessor in damages for failure to drill any such well during the time Lessee is relieved from the obligation so to do; provided, this paragraph shall not have the effect of altering the condition under which this lease will remain in force beyond its primary term, unless at the time of expiration of the primary term Lessee is prohibited from drilling upon the leased premises by governmental orders in which event the primary term shall be extended automatically from year to year until the first anniversary hereof occurring 90 or more days following the cancellation of such governmental order; but inability to commence operations for drilling, and to drill, a well shall not relieve Lessee from the requirement of paying rentals if Lessee desires to continue this lease in force during any extension of the primary term, in absence of production, drilling and reworking operations, said rentals, for the purpose of this clause, after January 1, 1955, being fixed at the rate of One ($1.00) Dollar per acre per year, when lawfully demandable. In determining whether Lessee has used reasonable diligence wherever required by any obligation of this lease, express or implied, the causes of delay in this paragraph set forth shall not be exclusive of any other cause or causes which may exist. If for any period or periods of time after oil or gas has been discovered on the leased premises same is not produced because Lessee is unable to obtain and install by reason of any cause set forth herein, any equipment or material necessary for handling or transporting such production, then nevertheless during such period or periods of time it shall be considered for the purpose of continuing this lease in effect under the terms hereof that production of oil or gas is being had upon the leased premises.

12. Lessee is hereby given the right to pool or combine the acreage covered by this lease or any parts thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order to promote the conservation of oil, gas or other minerals, such pooling to conform to

drilling units prescribed by any applicable order of any governmental authority having jurisdiction of the subject matter, if such order be issued. Lessee shall record in the appropriate Records of the County in which the leased premises are situated, an instrument describing the pooled acreage. Operations for drilling or production on any part of a drilling unit composed in whole or in part of the land above described shall be considered as operations for drilling or production on land covered by this lease and the entire acreage constituting such unit or units shall be treated for all purposes as if same were included in this lease, except that in lieu of the royalties elsewhere herein specified Lessor shall receive on production from each of such units that proportion of the royalties herein stipulated that the amount of his ownership in the mineral rights in the acreage placed in the particular unit involved bears to the entirety of the mineral rights in such unit.

13. Lessor only warrants specially and shall not be obligated to refund the bonus received or any part thereof unless and except there be a breach of the special warranty occurring by claims of persons claiming by, through, or under the Lessor herein. In the event Lessor's title is disputed by suit or otherwise, Lessee shall have the right to withhold the payment of royalties provided for hereunder until the final determination of any such suit or dispute favorable to Lessor and shall have the right in such event to maintain this contract in force by giving notice to Lessor, or to the depository hereinabove named, of its intention to withhold such royalties. Lessee shall have the right to acquire or lease the interest of any party in said land and minerals which any such party claims is not covered by this instrument.

14. It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom, (unless and until Lessor establishes some title

to or interest therein either by compromise settlement or final decree in the suit entitled N. L. Hudson et al., complainants, *v.* The Gulf Refining Company et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi) but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases heretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, page 251; by Margiree Jones and Abb Jones, recorded in Oil Lease Book 2, page 213, and by Mason Newell, recorded in Oil and Gas Book 6, page 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi. It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its lessors named in this paragraph have and had good and valid titles to the whole of the lands covered hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee shall in no manner be deemed or construed a repudiation of the terms of this lease.

And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay to Lessor any of the royal-

ties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *v.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein.

15. Lessee shall have the right at any time to discharge in whole or in part any tax, mortgage or other lien upon said land or mineral rights therein, including redemption from tax sale or adjudication and be subrogated to the rights of the holder thereof, and thereafter Lessee shall have the right to retain all rentals and royalties provided for hereunder, or any portion or portions thereof, and apply same towards reimbursements of Lessee for such payment upon giving notice of its intention to so apply such payments to Lessor or to depository named herein.

Lessor acknowledges receipt of Ten ($10.00) Dollars and other considerations, paid by Gulf Refining Company, as the full and adequate consideration for every right granted herein. The property above described is not homestead of Lessor.

Thus done, read, and signed on this the 15 day of Dec., 1944.

MRS. GERTRUDE HUDSON ELLISON,
By E. Q. HYDE,
Attorney-in-fact.
By C. A. HUDSON, Charles A. Hudson,
Attorney-in-fact.
By N. L. Hudson,
Attorney-in-fact.
MRS. LESSIE HUDSON SMITH,
By E. Q. HYDE,
Attorney-in-fact.
By CHARLES A. HUDSON,
Attorney-in-fact.

(Continued on page 86)

(Continued from page 85)

By N. L. HUDSON,
Attorney-in-fact.

MAY I. HUDSON THOMPSON,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

MRS. EXIE HUDSON,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

MRS. LLOYD K. TILGHAM,
By PHILIP L. HUDSON,
Attorney-in-fact.

GRAYDON M. BLACKMON,
PHILIP L. HUDSON,
CHARLES A. HUDSON,
MRS. MAY HUDSON,
MRS. RUBY MAE MITCHELL,
N. L. HUDSON,
L. F. EASTERLING,
L. C. FRANKLIN,
MRS. GRACE HUDSON HYDE,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

E. S. BLACKMON,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state the above and within named, L. F. Easterling and L. C. Franklin, who acknowledged that they and each of them signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, E. Q. Hyde, Charles A. Hudson and N. L. Hudson, attorneys in fact for the above and within named, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, who acknowledged that for and on behalf of the said above and within named, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, that they signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as the act and deed of the said Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, and that they were duly authorized thereto.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF ——,
County of ——:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Mrs. Lloyd K. Tilghman, who acknowledged that she signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as her own act and deed.

Given under my hand and seal of office, this the — day of December, 1944.

—— ——,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Graydon M. Blackmon, who acknowledged that he signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF LOUISIANA,
Parish of Ouachita:

Personally appeared before me, the undersigned authority, in and for said parish and state, the above and within named, Mrs. May Hudson, and Mrs. Ruby Mae Mitchell, who acknowledged, that they and each of them signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 18 day of December, 1944.

ROBERT COWDEN,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, N. L. Hudson and Charles A. Hudson, who acknowledged that they and each of them individually signed and delivered the above and foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF ——,
—— of ——:

Personally appeared before me, the undersigned authority, in and for said —— and state, the above and within named, Phillip L. Hudson, one of the Lessors in the foregoing instrument of writing, who acknowledged that he signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the — day of December, 1944.

—— ——,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Phillip L. Hudson, attorney-in-fact for Mrs. Lloyd K. Tilghman, who acknowledged that for and on behalf of the said Mrs. Lloyd K. Tilghman, he signed and delivered the foregoing instrument of writing on the day and year of its date as the act of the said Mrs. Lloyd K. Tilghman, and that he was duly authorized thereto: Also, personally

appeared before me, the undersigned authority, Phillip L. Hudson, individually, one of the lessors in the foregoing instrument, who acknowledged that he also signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
Notary Public.

[SEAL.]

My Commission Expires Sept. 9, 1947.

THE STATE OF MISSISSIPPI,
Jasper County, First District:

I, J. J. Denson, Clerk of the Chancery Court in and for said County, hereby certify, that the accompanying Instrument was filed in my office for record on the 21 day of December, 1944 at 4:15 P. M., and that the same, together with the certificate of acknowledgment, was this day recorded in Deed Book No. 18, Pages 479-485.

Witness my hand and official seal this 16 day of Jan., A. D. 1945.

J. J. DENSON,
Clerk,

[SEAL.]

By EMITZ JOE HEWITT,
D. C.

APPENDIX C

No. 398

In Re: N. L. HUDSON, et al

vs.

GULF REFINING Co., et al, First District, Jasper County

GENTLEMEN:

I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court "with a sufficient number of deputies or bailiffs." I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes in the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

If you have any suggestions to make I will be glad to hear from you.

With regards and best wishes, I am,

Your friend,

(S.) Geo. B. Neville,
Chancellor.

APPENDIX D

In the Chancery Court of the First Judicial District of Jasper County, Mississippi

No. 398

N. L. Hudson, et al,

v.

Gulf Refining Company, et al

Complainants—Defendants

Final Decree

This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defend-

ants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and the general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the court-room which they then and there did;

Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1

That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, and does not recognize the right of complainants to withdraw as was wrongfully done, the Court reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.

2

That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice.

3

That the demurrer of complainants and cross-defendants to the cross-bill of Gulf Refining Company be and it is hereby overruled.

That the Gulf Refining Company as cross-complainant is entitled to the relief prayed for in its cross-bill against complainants and cross-defendants and that the leases possessed by the Gulf Refining Company as listed in its original answer and cross-bill and recorded as follows, to-wit:

(1) Jettie Windham, G. R. Windham, Carrie Husband, and Norma Husband to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 251, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(2) Margiree Jones and Abb Jones to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 213, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(3) Mason Newell to Gulf Refining Company, recorded in Oil & Gas Record Book 6, at page 547, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(4) T. D. Lewis and Annie Lewis to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 219, of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi; and amendment thereto recorded in Oil & Gas Book 9, at page 341 of said records.

are hereby adjudged and decreed to be good and valid; and that all claims of title, right or interest on the part of the complainants and cross-defendants and each of them in and to any or all of the lands covered by said leases are hereby canceled, annulled, and for naught held, and adjudged to be without foundation in fact or in law, and that the cross-complainant Gulf Refining Company is not due complainants and cross-defendants any royalty or royalties whatsoever.

5

That no final record herein shall be made except that this decree shall be entered on the final record book and recorded as deeds are required to be recorded.

6

That complainants and cross-defendants pay all costs herein to be taxed and that decree therefore is hereby entered against all such complainants and cross-defendants and the sureties on their bond for costs filed heretofore in this cause, for all of which execution may issue.

Ordered, adjudged and decreed in open court this the 6th day of May, 1946.

(S.) Geo. B. Neville,
Chancellor.

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,406

(Opinion rendered April 21, 1947)

Division B

N. L. Hudson, et al.,

vs.

Gulf Refining Company, et al.

L. A. Smith, Sr., *J.*

Thirteen heirs of N. L. Hudson, Sr., claiming to be the sole and only owners in fee of the 360 acres of land described, as well as of all the mineral interests therein, filed their bill in the Chancery Court of Jasper County against 106 defendants, including the Gulf Refining Company (which, under a mineral lease from certain of its co-defendants, had developed and was developing its holdings

into an actual oil-producing acreage), and against other defendants, who, in addition to Gulf Refining Company, claim under other mineral leases covering in the aggregate all of the lands in question.

The claim of the said Hudson heirs is that during the year 1877 or 1879, N. L. Hudson, Sr., the then owner of the land, had conveyed all of it to his wife, M. E. Hudson, for the term of her natural life, and at her death to the children of said N. L. Hudson, Sr., for life, the remainder in fee to their children; that the deed was duly recorded, but the record thereof was destroyed by the courthouse fire in September 1932; and that complainants have not been able to find the original deed for recordation. It was further averred that N. L. Hudson, Sr., died in 1895, and M. E. Hudson, in 1928, and that subsequently to the date of the deed conveying a life estate to her, M. E. Hudson had executed deeds of conveyances to various grantees as if she owned the title in fee simple. Complainants, appellants here, also charged that by these conveyances the 106 defendants were, as latest grantees or their heirs, the present adverse claimants; and that by reason of the facts, supra, appellees had become, and remained since the death of M. E. Hudson, the tenants at sufferance of the complainant heirs.

Nearly all of the numerous defendants answered, and Gulf Refining Company and some twenty-five other defendants made their answers cross-bills. The answers denied that Hudson had made any such deed to his wife in 1878 or 1879, or at any other time in any such terms as asserted by complainants. On the contrary, they averred that, in fact, Hudson had made to his wife, M. E. Hudson, on January 23, 1880, a deed to the lands in fee simple absolute, this deed being recorded in Book 20, p. 135 of the record of deeds of the county. The defendants, appellees here, averred also that by unbroken chains of title from M. E. Hudson to them, as well as by more than forty years of adverse possession, they have become the owners, and that the complainants never in fact owned any interest whatever in the lands.

The answer by Gulf Refining Company, in addition to elaborate denials and averments touching the title by executed conveyances, adequately alleged adverse possession

in its predecessors in title for the long period of years aforesaid. Making its answer a cross-bill, it prayed that its mineral lease be confirmed as against the original complainants, and prayed for alternative as well as for general relief. The twenty-five other defendants who made their answers cross-bills, in addition to setting up their particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. The answer and cross-bill of Gulf Refining Company was filed on Sept. 16, 1944, and those of the other twenty-five cross-complainants on September 30, 1944. On December 12, 1945, the complainants filed a motion to dismiss their original bill aforesaid without prejudice, which motion was actively resisted by numerous of the original defendants, and the motion was overruled.

Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.

In days gone by it was the general rule that the dismissal of the original bill carried with it the cross-bill, but the modern rule, and particularly in this State, is as stated in Griffith Miss. Chancery Practice, Section 384, which reads as follows:

"The strict theory of the cross-bill is that it is a dependent of the original bill, in consequence of which formerly it was generally held that a dismissal of the original bill carried with it the cross-bill, but this rule too has been departed from so that now if the cross-bill seeks affirmative relief separately and independently of the original bill—although, of course, growing out of or touching the same subject matter involved in the original bill, as it must—the court will at the insistence of the cross-complainants retain it and proceed with its issues, if the cross-bill and its facts be complete enough within themselves and without the aid of the original bill which no

substantial aid is furnished by the original bill, and as to Gulf Refining Company it prays that its title be confirmed in it as against all the original complainants. This right to have an affirmative adjudication in chancery of title to real estate is one conferred by statute, supplementary to the ancient rules in equity on that subject. It is not so clearly of law as to be distinctly a better subject of determination at law, the fact being that, at this day in this State, land-title questions are almost always presented in the chancery court, the action of ejectment having become nearly obsolete in actual practice, and certainly so in cases involving parties as numerous as in the instant case.

It is said, however, that as to Gulf Refining Company, the latter filed no objections to the motion to dismiss and thus did not insist that its cross-bill be retained, to which Gulf Refining Company replies, citing Griffith Chan. Prac., Sec. 407, that no formal objection or response to such a motion was required, and the burden of proof to support it was on the movant; and further that the record above shows that Gulf Refining Company, by its attorney, was present and participated in the hearing wherein the motion to dismiss was resisted.

We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; and, further, that upon the record the court was correct in sustaining the cross-bills on the merits.

This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become res adjudicata. Van Zandt *v.* Town Braxton, to make the granting of relief thereon practicable and proper. It is at last a matter within the sound discretion of the court to be

wisely exercised towards the advancement of justice between the parties. And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. Therefore, it is only when the matter of the cross-bill, independently considered, is so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed, or transferred, merely because the original bill has been dismissed."

This statement is in accord with the weight of authority elsewhere, as may be found in 30 C. J. S., Equity, Sec. 388, pp. 804-806.

Thus it is seen that the cross-bill will be retained where, if the matter therein had been brought in an original bill, it would have been retained, and that in such case it is only when the matters of the cross-bill, independently considered, are so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed merely because the original bill has been dismissed. In other words, where the relief sought by the cross-bill is a matter cognizable at law, dismissal of the original bill carries with it, generally, the cross-bill, and the cross-complainant is relegated to his remedy at law. But here the prayer of the cross-bills sought confirmation of title to land, and hence was equitable, as pointed out further in the succeeding paragraph.

Here, the cross-bills bring forward, with elaboration, the issue of adverse possession, and rely thereon in addition to the title by conveyances, a feature in respect to 149 Miss. 461, 465, 115 So. 557; Watkins *v.* State Board, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see also Griffith's Chan. Prac. Secs. 263, 363, 571, 624.

In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it nec-

essary to discuss other points, on both sides, ably argued in the several briefs filed.

The decree of the Chancery Court will, therefore be and is affirmed.

Affirmed.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 270

N. L. HUDSON

v.

MASON NEWELL et al.

No. 271

N. L. HUDSON

v.

T. D. LEWIS, et al.

No. 272

N. L. HUDSON

v.

JETTIE KELLY WINDHAM, et al.

No. 278

N. L. HUDSON

v.

MARGIREE JONES, et al.

APPEARANCES:

For the Plaintiff—Honorable L. F. Easterling, Deposit Guaranty Bank Building, Jackson, Mississippi; Honorable Lester Franklin, Century Building, Jackson, Mississippi; Honorable George E. Shaw, Century Building, Jackson,

Mississippi; Messrs. Cameron & Wills, Threefoot Building, Meridian, Mississippi.

For the Defendants—Messrs. Wilbourn, Miller & Wilbourn, Meridian, Mississippi; Messrs. Welch & Cooper, Laurel, Mississippi; Honorable J. R. Buchanan, Laurel, Mississippi; Honorable Irwin W. Coleman, Box 2513, Jackson, Mississippi; Honorable C. C. Richmond, Box 2513, Jackson, Mississippi; Messrs. Green & Green, Standard Life Building, Jackson, Mississippi; Honorable J. Morgan Stevens, Standard Life Building, Jackson, Mississippi; Messrs. Wells, Wells & Newman, Lamar Life Building, Jackson, Mississippi; Honorable John E. Green, General Counsel, Gulf Refining Company, Houston, Texas.

Be It Remembered that on, towit, the 14th day of March, 1946, the above entitled cases came on for hearing on motions to dismiss for lack of jurisdiction before the Honorable Sidney C. Mize, Judge of the United States District for the Southern District of Mississippi, at Jackson, Mississippi, when the following proceedings were had and done:

Mr. Buchanan: We wish to make the statement that A. G. Corchester in causes No. 270 and 278 is a citizen of Shreveport, Louisiana.

Mr. Cameron: We agree to that.

Mr. Buchanan: A. G. Dorchester, in Cause No. 270, is the owner of a 1/16 royalty interest in the W½ of the E½ of Section 19, Township 1 Range 13 East, which tract is unitized with the E½ of E½ of SE¼ of Section 19, Township 1 Range 13 East. Both of the unitized wells were drilled on the tract of land described as the W½ of E½ of SE¼ of said Section 19.

Mr. Cameron: Plaintiff agrees that the two wells are on the Jones tract, which is the W½ of this 80 acre tract, and that Mrs. A. G. Dorchester of Shreveport, Louisiana, owns a royalty interest on the Jones tract. The extent of that ownership we do not know and have no information about except hearsay, and would want proof on that. We know it is unitized, but I have never seen a copy of the unitization agreement.

The Court: Does that dispose of agreements in Cause No. 270? Will there be any other controverted issues of fact?

Mr. Buchanan: None as to unitization.

Mr. Green: As to the unitization, we very probably have copies which will be available.

The Court: Maybe you can agree on that later. (After discussion.) It is agreed by all parties in all the cases that N. L. Hudson, et al., signed the contract dated April 5, 1944, filed April 17, 1944, recorded in O. & G. Vol. 11, page 605, Jasper County, Mississippi, First District, which document is made Exhibit "A" to the joint answer of George J. Leiderion, et al., in Cause No. 270, and that this document may be considered as a part of the agreement in all of the cases hereinabove numbered, 270, 271, 272 and 278.

It is agreed that on September 11, 1944, N. L. Hudson, et al., executed a contract which was filed for record on September 23, 1944 in the office of the Chancery Clerk of Jasper County, Mississippi, and that a certified copy is now offered in evidence and marked by the Reporter as Exhibit "1" to this record.

It is agreed by all the parties that the document styled "contract" dated on its face the 5th day of November, 1945 and shown on its face to have been acknowledged on the 11th day of December, 1945, was signed by the parties whose names appear thereon and that same may be marked an exhibit hereto as Exhibit "2". This agreement is made by the parties, subject to the objections of any of the parties as to its relevancy or competency or legal effect, and the parties reserve the right to show whether or not those purporting to sign for someone else were duly authorized thereunto so to do. This document applies to all cases and the agreement is so understood.

In Cause No. 271 it is agreed that the oil, gas and mineral lease dated May 18, 1945 and marked Exhibit "C" to the motion to dismiss filed by T. D. Lewis, et al., was executed and may be considered as a part of the record in Cause No. 271 and in all other cases where relevant, material and applicable.

It is agreed between all parties that the map herewith marked Exhibit "3(a)", together with the affidavit of Joe T.

Goodman, marked Exhibit "3(b)" dated March 11, 1946, may be considered on this hearing wherever applicable to any of the cases.

It is agreed that the document marked "Unitization Agreement" dated the 12th day of June, 1944, between Tidewater Association Oil Company on the one part and Beckett, et al., on the other, was executed and is made a part of the record herein, to be considered if applicable, competent and material to any of the issues involved in any of the cases, and is marked Exhibit "4" to this record.

With reference to Exhibit "4", it is agreed that the Todewater Association Oil Company is a Delaware Corporation and C. B. Small, Jr., is a citizen of Louisiana and was at the time of the filing of the suit herein; and Claude B. Hammill is a citizen of Texas; that C. M. Beckett is a citizen of Texas; and that Joseph M. Perkins is a citizen of Texas, and each of them were citizens of Texas at the time the suit was filed.

It is agreed that Kenneth H. Wasson was, at the time of the filing of the suit, and is now, a citizen of Texas. It is agreed that L. P. Rush was at the time of the filing of the suit, and is now, a citizen of Louisiana.

It is agreed that the citizenship by the names of citizens set out in the document marked Exhibit "5" is correctly stated and that those people were at the time of the filing of the suit and now are citizens of the states set out in said Exhibit "5" respectively, and that this is true in all of the cases.

It is agreed that the affidavit of Claude S. Posey as to the citizenship of Lee McCormick may be introduced in evidence without any objection and marked Exhibit "6".

Mr. Cameron: In connection with the citizenship of Mr. McCormick, I desire to state that the instrument through which he was claiming royalty interests bears on the face of the instrument his address as Pinehurst Hotel, Laurel, Mississippi. I asked a couple of other men in the Pinehurst Hotel what state he was a citizen of and they told me he had moved to Mississippi and on that information we sued him. Soon after we filed the suit in federal court I saw the pleading filed by Mr. Wilbourne in which he declared that Mr.

McCormick was a citizen of Louisiana and I went immediately, before any answer was served in any of these cases, and dismissed as to Mr. McCormick.

The Court: It is agreed that Exhibit "B" to the motion to dismiss, filed by T. D. Lewis, et al., in Cause No. 271 herein is a correct photostatic copy of the original bill of complaint filed in the Chancery Court of Jasper County, Mississippi, and may be considered upon the hearing of all of the cases herein where applicable, competent and material.

It is agreed that in Cause No. 398 of the Chancery Court of Jasper County, Mississippi, styled N. L. Hudson, et al., v. Gulf Refining Company, et al., there was filed an amendment to the bill of complaint and that same may be considered by the Court on the hearing in the cases herein now being heard, as to any one of the cases or all of them where applicable, competent and material, and that a copy will be furnished to the reporter to be marked Exhibit "7".

It is agreed that in said cause in Jasper County, No. 398, a second amendment to the original bill of complaint was filed and that same may be considered by the Court herein on the hearing of these cases where applicable, competent, material and relevant, and that a copy may be furnished to the reporter to be marked Exhibit "8".

It is agreed between all the parties that the certified copies of conveyances herewith tendered to the reporter and marked Exhibits "19," "10," "11," "12," "13," "14," and "15," may be considered by the Court on the hearing herein in each and all of the cases where applicable, competent, relevant and material.

Mr. Stevens: It is stipulated that on the 16th day of March, 1944 Talmadge D. Lewis and his wife, Mrs. Ernie L. Lewis, executed and delivered a mineral royalty conveyance to their eight children, including Myrtle Lewis, then and now a minor, and that on the 17th day of May, 1944 the said Talmadge Dewitt Lewis and his wife, Mrs. Ernie L. Lewis, conveyed a second mineral royalty conveyance to their eight children, including the said Myrtle Lewis, a minor. I would like for Mr. Cameron also to stipulate that Myrtle Lewis is a minor and that her brother, Thomas Mel-

vin Lewis, has been appointed by the Chancery Court of Jasper County her legal guardian and that he has appeared for her in said cases.

Mr. Cameron: I agree to all that with the statement that Myrtle Lewis was inadvertently omitted from the complaint in this case through the error of the stenographer assuming that Myrtie and Myrtle were the same person and failed to put in the two.

The Court: It is agreed that the document marked Exhibit "16" is the protective lease or is a lease executed by Mrs. Gertrude Hudson Ellison, et al., dated the 15th day of December, 1944 to the Gulf Refining Company and may be considered by the court where applicable, competent and material to each and all of the cases now before the court for hearing.

It is further agreed that the documents numbered Exhibits "17," "18," "19," "20," "21," "22," "23," and "24," being powers of attorney, acknowledgments, etc., may be considered along with Exhibit "16" where applicable, competent, material and relevant to any of the cases herein on hearing, and that the Gulf Refining Company paid a cash consideration of $50,000 for this lease.

It is agreed that the document now handed to the reporter and marked Exhibit "25," showing the pipe line production, may be considered by the court in each and all cases where applicable, competent and material to the issues now being heard by the court, and that production is still continuing; and it is further agreed that the price at which this oil was disposed of was approximately 80¢, and this stipulation is for jurisdictional purposes and may be varied by any party interested as to the actual facts.

Mr. Buchanan: The defendants offer letter of February 8, 1946, written by Judge V. A. Griffith of the Supreme Court of Mississippi, together with certified copy of the order in Cause No. 398 of Jasper County, dated January 14, 1946; also certified copy of order of the Chancery Court of Jasper County dated January 18, 1946; certified copy of application for appeal by the plaintiffs in said cause and certified copy of the order of the Chancery Court of Jasper County overruling the application for appeal, which order is dated

February 1, 1946; and would ask that this be marked Exhibit "26" to the record.

Mr. Cameron: It is agreed between the parties that copies of the plaintiff's motion to dismiss without prejudice and all of the pleadings filed by the defendants in objection thereto, and the pleadings filed by the plaintiffs in response to said objections, in Cause No. 398 in the Chancery Court of Jasper County, Mississippi, may be inserted in the record in this case and considered by the court in each and all cases where applicable, competent, material and relevant thereto, and that these copies may be furnished to the reporter herein later by the plaintiffs, and all of the said documents to be bound together and marked Exhibit "27" to this record.

Mr. Cameron: It is agreed between the parties that the attorneys for Mason Newell, towit, Mr. J. R. Buchanan, may insert into the record all or any part of the interrogatories addressed by the plaintiff in the Chancery Court case to Mason Newell, and all or any part of his answers to those interrogatories, which document is to be furnished to the reporter by Mr. Buchanan in one binding and will be marked Exhibit "28."

It is also stipulated that interrogatories were addressed by the plaintiff to the Gulf Refining Company in said cause No. 398 and were answered.

Mr. Cameron: It is agreed that either party may place into this record all or any part of the evidence taken before the Chancellor on the motion to dismiss the Chancery Court case and that such evidence, when certified by the court reporter, may be inserted into the record by either party and marked Exhibit "29."

The Court: It is further stipulated in all these cases—No. 270, No. 271, No. 272 and No. 278—that each and all of the stipulations hereinbefore entered into and each and all of the documents hereinbefore put into the record may be considered by the court upon the hearing of the matters now before the court in each and every case where any of such stipulations or documents may be applicable, competent, relevant and material.

The Court: The court having been called upon to make a ruling as to who should proceed with further testimony upon the motions to dismiss, and the court having examined the pleadings, finds that the defendants have challenged the jurisdiction of the court by motion to dismiss the case in each of the cases for lack of jurisdiction, and the matter being before the court solely upon the question of whether or not the court has jurisdiction in each case, holds and rules that upon this hearing of the motion to dismiss for lack of jurisdiction that the duty to go forward with the evidence is upon the movants and, therefore, will call upon each one of the defendants to answer if there is any oral evidence or further evidence that he desires to present upon the hearing of the motion to dismiss for want of jurisdiction.

Mr. Green: We ask that the oath be waived and that Mr. Cameron be asked to take the witness stand.

The Court: Very well, Mr. Cameron you may take the witness stand.

Ben F. Cameron, of counsel for the plaintiff, the oath being waived, came to the witness stand and testified as follows:

Direct examination.

By Mr. Green:

Q. You are of counsel for the complainant in this case?

A. Yes sir.

Q. When did you become associated in this case?

A. I believe it was about the end of 1944, just after the $50,000 had passed, so that I didn't get any of that.

Q. Then, the contract which was made by the plaintiffs in this case with the Gulf Refining Company was made at a time when you were in no way connected therewith?

A. That is right.

Q. After this connection was had in 1944, this case proceeded in the state court until there was a motion made at the end of 1945 to dismiss?

A. The motion was filed December 12, 1945.

Q. Now, in this case there is an agreement that was marked Exhibit "2" to the bill that was assumed to be executed. This stipulation or agreement marked Exhibit "2" as I understand, was dated on November 5, 1945?

A. On its face it bears that date.

Q. Who prepared that stipulation?

A. I did.

Q. What was the reason that that stipulation was prepared?

A. Well, there were several reasons. Reason No. 1 was that Shaw and Cameron came into the case after Easterling and Franklin had gotten their assignments from the Hudsons. We had no assignment from the Hudsons and no employment with them. Easterling and Franklin had given us a partial assignment of their interests and it was agreed that when it was convenient we would have a new contract made making the assignment of 33⅓% interest or 40%, according to the circumstances, to the four lawyers so that we would have an equal share.

Q. Let me get it straight. There was a contract when you and Mr. Shaw came in whereby Mr. Easterling and Mr. Franklin gave you an interest in this matter?

A. Yes sir.

Q. Was that contract in writing?

A. Yes sir.

Q. Would you mind producing that contract in writing?

A. It was of record all the time. I have never had a copy of it.

Q. This is the contract to which you make reference? (Hands paper to the witness.)

A. No, it is not. This is a supplemental contract between the Hudsons on the one side and Easterling and Franklin on the other. They had two contracts with the Hudsons before we came into the case and you have exhibited both of them here. After we got into the case Easterling and Franklin assigned Shaw and Cameron a part of their interest, but not the whole of it.

Q. Is this the contract? (Shows the witness document marked Exhibit "1.")

A. This appears to be a certified copy of the partial assignment made by Easterling and Franklin to Shaw and Cameron, dated the 17th day of January, 1945.

Mr. Green: I now offer this in evidence as Exhibit "30" to this record.

Q. Now, that assignment was made by Judge Easterling and Mr. Franklin to you and Mr. Shaw?

A. That is correct.

Q. And that assignment continued in effect until, according to your statement, the execution of the conveyance of date November 5, 1945?

A. No, it did not. I have stated that the prime purpose of this new contract was to make certain the deal that Shaw and Cameron had with Easterling and Franklin. We took this assignment from these gentlemen and placed it of record and about two weeks after we took it, in discussions between Mr. Shaw and myself on one side and Mr. Franklin on the other it came out that Shaw and I thought we had one fourth. In other words, we were going along fifty-fifty with our friends. Mr. Franklin said, "Judge Easterling doesn't understand it that way. He thinks you have one-fourth together." In about an hour I wrote a note and sent the papers back and said we were sorry about the misunderstanding, but we were not willing to go along on that basis. Immediately we all got together and they said they were sorry too and said we could share fifty-fifty with them, and we went along on a gentleman's agreement with the understanding that when it was propitious we would have the Hudsons clarify the whole thing and give us a direct assignment. This instrument here was never in effect. We had a verbal agreement during that interim up until December 5, 1945 when we executed a new agreement.

Q. As I understand it, this agreement which we have just introduced conveyed to you and Mr. Shaw, as I interpret it, an undivided one-fourth interest.

A. That is what we thought—of what these folks would get out of it.

Q. There was a difference of opinion between you and your brother lawyers as to whether they meant one-fourth

for you and Mr. Shaw or meant as you stated—a major portion for Judge Easterling and Mr. Franklin.

A. That is right.

Q. Then, I understand that shortly after that condition arose you bundled the papers back and it was agreed that your interpretation of this contract as written was the correct interpretation?

A. No, we had a verbal agreement that regardless of what was said that they would get 50% and we would get 50% of any recovery that was gotten out of the case.

Q. That would be what that agreement provided for?

A. I really don't know. I never went into it. We had a gentleman's agreement to supersede that.

Q. That instrument was placed of record and has been recorded?

A. That is correct.

Q. Under these arrangements that were made there was a conveyance, was there not, to you and Mr. Shaw and Judge Easterling and Mr. Franklin of an interest in this land itself?

A. I don't think so. I never have thought so. I think the two instruments from the Hudsons to Franklin and Easterling show an intent and agreement that those two lawyers never got anything until by lawsuit or compromise they had earned something.

Q. Isn't it a face that in the powers of attorney which were submitted to the Gulf at the time this lease was executed that it was specifically provided in there that there should be a conveyance of 25% to Easterling and Franklin?

A. I have never seen that. If you will give me a minute I will read you the portion I assume you refer to: (Reading from Exhibit "17") "And we also hereby definitely and specifically authorize our said attorneys in fact to hire and employ such attorney or attorneys at law as they may deem advisable to represent our interests in and about said property and to contract with such attorneys at law for such compensation as they may think proper and as compensation to such attorneys at law or said attorneys in

fact may convey to said attorney or attorneys at law so employed by them an undivided interest in said property and in any and all claims and demands which we have against other companies or other people, said interest so conveyed to said attorney or attorneys at law not to exceed 25% of such interest." You asked me a legal question, Mr. Green. That invests these attorneys in fact with the power to convey to these attorneys at such time as the attorneys in fact should desire any interest in any property which might be recovered. That is my opinion and I think that is purely a matter of law.

Q. At the time you were discussing this matter you were not advised as to the provisions in these powers of attorney as to their conveyances?

A. No sir.

Q. As to what was said about the time that Judge Easterling and Mr. Franklin were required to join in the Gulf Lease, of course you know nothing about that?

A. Nothing except what they said.

Q. But it was a fact that they joined in the Gulf lease?

A. Yes sir.

Q. And they were made parties to that lease and the circumstances under which they were made parties to that lease—were you familiar with that or not?

A. No, I was not at all familiar with it. I have accepted what they told me.

Q. So when they were joined in this suit you had no knowledge as to how that was arrived at or what was said at that time?

A. No sir.

Q. Now, was there any desire on the part of the plaintiff in this case to abandon the court in Jasper County and transfer this case to the federal court?

A. You say on the part of the plaintiff?

Q. Yes.

A. Well, yes, when we recommended that we move to dismiss the case in the state court and file these cases in the federal court that was thoroughly discussed with these attorneys in fact and trustees and was approved by them.

Q. So the parties to this suit were satisfied with the way the suit was being handled in the Chancery Court and at a later time the attorneys, including your good self, called the plaintiffs in and discussed with them the transfer of this litigation to the Federal Court?

A. You say they were satisfied? I don't know. They live in Louisiana and knew nothing about what was transpiring. The only hearing we had was before Judge Neville about the production of some documents and they were distinctly dissatisfied with what happened there and said to us that day, "You will never win that case in this court."

Q. Who made the recommendation about transferring the case from the chancery court to the federal court?

A. The lawyers initiated it and recommended it to the litigants.

Q. How many litigants were talked to?

A. The three trustees. Mr. Blackman took it up with us and approved it.

Q. Who were the conferences had with?

A. All three of the trustees. They came to Jackson on December 4 and 5, 1945.

Q. Before December 5 did they know why they were coming to Jackson?

A. We had discussed it in Meridian back in June or July when the hearing on the motion was held. We discussed then going into the federal court.

Q. Then on the 4 and 5 of December there was a conference held in Jackson between the attorneys and the trustees of the plaintiff in this case?

A. Yes.

Q. As to the powers of attorney, did you have those before that time?

A. I did not. I had never seen them.

Q. Did you know what the powers of attorney provided as to those parties at that time?

A. Only what Judge Easterling and Mr. Franklin told me.

Q. On the 5th day of November you re-wrote or prepared that document which was signed on the 4th and 5th of December?

A. I couldn't give the date. That document was written and re-written about three times. My recollection is that we had it in our possession possibly a month before it was executed.

Q. When that document was formulated were you in conference with Mr. Hyde and the other trustees?

A. No sir.

Q. That document was prepared by you at a time when you didn't know what the power of these trustees was and at a time when you did not know what had been done with regard to the formation of the protective lease between Judge Easterling and Mr. Franklin and the Gulf?

A. I was hoping in a lease. I did not participate in the conference leading up to it. I had not seen this but I understood that they had plenary powers.

Q. In consideration of the clarification agreement that was made, you undertook to convey back to whom?

A. I am quoting from clause 4 of that new agreement dated November 5, but in fact executed December 5, 1945: "It is understood and agreed that this employment is contingent upon recovery and that the parties have not intended and do not intend that any interest in any land or property shall pass to the said attorneys until after final decree or consummation of a compromise, and that the said heirs are not to pay anything to said attorneys for their services except in the event of a compromise or recovery; and said attorneys hereby convey and quit-claim to the said Hudson heirs any interest in any land or property which may have vested in them by virtue of the instruments herein mentioned or any other contracts which may have been made between the parties." I think that is the only clause in there that had reference to anything like you asked me about.

Q. That conveyance to the Hudson heirs,—they were not in any way named, were they?

A. That is the language there. My assumption would be that in the reference in clause 4 to the said Hudson heirs the reference would be to those enumerated in the contract.

Q. Those were not the Hudson heirs in the entirety?

A. I have never figured out who the Hudson heirs were.

Q. When you prepared that instrument you did not go to the deed and find out who the Hudson heirs were and the proportion each of the heirs were to participate?

A. No sir.

Q. In that reconveyance you have used the phrase "Hudson heirs", I believe, specifying the portion of the 40% vested in you and Mr. Shaw and Judge Easterling and Mr. Franklin?

A. That speaks for itself.

Q. When you were dealing with that reconveyance how were you dealing with the money which had been paid to Judge Easterling and Mr. Franklin?

A. Judge Easterling and Mr. Franklin had collected whatever fee came to them out of that settlement. I know nothing about that.

Q. When you were revising the contract under which Judge Easterling and Mr. Franklin got that payment you made no reference to that at all?

A. No sir, they explained to me that the deal between them and the Hudsons always had been that they didn't get anything at all of property or money until they had actually realized something by compromise or by winning the lawsuit. They insisted that throughout that is the only deal they had with the Hudsons.

Q. In this situation there was accumulated royalty that was then due to Judge Easterling and Mr. Franklin and yourself and Mr. Shaw. What disposition did you make of that accrued royalty?

A. You said we didn't have any royalty and we realized that we didn't get any royalty until we licked you for the Hudsons.

Q. Assuming that you would lick us as of the date of the removal of that oil from the well, you would have been entitled to a royalty and a large part of that royalty was past due at the time of that agreement?

A. I think as a matter of law that when you convey land it carries with it all accruals of royalty.

Q. It carries future royalties?

A. The instrument that had been executed did not convey anything to those two lawyers until they had won the lawsuit and we were trying to clarify that feature.

Q. Now, there isn't any doubt about the fact, is there, that there was a direct conveyance in that contract to Judge Easterling and Mr. Franklin?

A. In my opinion, this contract, construed in connection with the other contract, shows a definite agreement with the lawyers for a contingent interest to be paid and to be paid only when something had been recovered.

Q. Will you read that contract and see if it doesn't convey in the present tense to those lawyers as of the date of the execution of the instrument?

A. That is correct. At your instance I have read the contract of April 5, 1944 between the Hudsons and Judge Easterling and Mr. Franklin down through the point, "Undivided one-fourth interest in and to all of said land or minerals recovered." In my opinion that was an agreement to make a conveyance in the future and definitely repudiated the thought that anything was presently conveyed.

Q. In your own way tell me the facts about this?

A. You asked me earlier in the examination when it was that a new contract with the lawyers was made. I told you there were several reasons why it was made. I have given you the first reason. Certainly the first in point of time. There was to be put in legal form the connection with Shaw and Cameron in the case and take it out of the realm of being just a gentleman's agreement. The occasion for the new contract grew out of the fact that the lawyers had decided to recommend to the Hudsons the bringing of the proper suits in the United States District Court and accompanying that with dismissal without prejudice of the cases in the state court. That occasion arose in this way. We incubated the idea and studied on the idea of probably coming into federal court, and made many investigations and wrote many letters back and forth. We had weekly conferences for the best of five months. Those conferences averaged half a day. Somewhere along the line somebody, I would say Mr. Franklin, said, "Don't you reckon those

lawyers will take the position that Judge Easterling and I are indispensible parties?" We got out the contracts and we read them. We decided that you could not make a valid point because those contracts construed by their four corners meant an assignment to take effect after the fruits of victory had come into possession. Also, we got out the Mississippi statute about lawyers not have to be made parties to a suit and we wondered if that would apply in federal court, but somebody suggested why not remove it from the realm of doubt and carry out the original contract that everybody agrees was the contract, and that is execute a document which would certainly be effective only after the Hudsons had won something by compromise or by lawsuit. So when that suggestion was made we thought it wouldn't do any harm and we agreed that I would prepare a proposed draft, Judge Easterling would prepare a proposed draft, and then we would make the final draft, and that was done. Lester Wills drew up the draft I have here with me in October. Judge Easterling drew a draft and mailed it to me at Meridian. I took the two drafts and in the hurry that we always work under, I made this present draft and we had it ready I think in the early days of November. We had the suits pretty much prepared by then and on November 28 Judge Easterling wrote the trustees and asked them to come over here. So on December 3 they wired that they were on the way and would get here Tuesday, December 4, about noon, I believe. They got here then and I hadn't gotten here, but on December 5 we met, all except Mr. Shaw, who was out of town and he had told us he would be out of town. We met and had a conference lasting most of the day, in which we went over with them thoroughly the matter of dismissing without prejudice in the state court and coming into federal court. We read them cases and went into it fully with them and then we took up the matter of the contract with them. We discussed that at very great length and then I read them this draft. They brought up certain features of that and finally we all agreed on the draft which I had prepared and which had been in the file since early November. There in Room 502 in the Century Building on December 5 the two Hudsons, Mr. Hyde, the three trustees,

Judge Easterling, Mr. Franklin and I sat down and signed two or three or four copies of this contract. There was no acknowledgment on it. I didn't think it had to be acknowledged or ought to be acknowledged because it was purely a private arrangement between attorneys and client, but some of them thought we might want to file it for record. I sent and got a stenographer and dictated a little acknowledgment. She came back and it looked like a Japanese puzzle. Then we went to Judge Easterling's office. He dictated an acknowledgment and passed them their two copies and we dispersed. Either Mr. Franklin or I signed Mr. Shaw's name to the copy we gave them. They took these on in my opinion without an acknowledgment, but on December 5 acknowledged this instrument, the original of which I have before me and copy of which has been put in evidence. That was on Wednesday, December 5. On Saturday, December 8, Mr. Shaw got back to town and signed this instrument here and acknowledged it on Saturday, the 8th of December. The young lady in Judge Easterling's office took the acknowledgment of all of us, but Judge Easterling was out of the office and didn't come in until the 11th. She signed her name and affixed her seal on the 11th day of December, 1945. That is as far as I can recollect the history of that instrument, Mr. Green. I might say that the discussion was had with the Hudsons as to whether they wanted this new contract recorded. They said they would leave that up to us. We agreed that we would all acknowledge one copy and would decide later whether to file it for record. For my part, I will tell you why I didn't file it for record. I didn't think perhaps you would catch the point and make it if it were not filed for record, but I knew if it were you would make a point. I thought it would be embarrassing for the lawyers to be brought into court and I thought it would not be made and that is the reason it wasn't filed for record. The first time I ever saw any one of you at Paulding I think I said to somebody down there: "You all are mistaken about your point about the attorneys. We have no contract." I mentioned that to different ones of you.

Q. Now, there was no additional cash consideration paid?

A. None at all. It was to carry out the original intention which these trustees stated to have been the only intention any of them ever had, and all five parties to these original agreements agreed that they had never had any intention of making any deeds until the fruits of victory had come into hand, and to carry out the original intention was the only consideration.

Q. The situation was that the Gulf and Tidewater lessee were not consulted about any of the changes?

A. No sir.

Q. No reference was made by this contract to these leases?

A. No sir.

Q. At the present time, as I understand it, Judge Easterling takes one-fourth, Mr. Shaw takes one-fourth, Mr. Franklin takes one-fourth and you have one-fourth?

A. That is the way we would divide it. I think it is just 33-⅓% to all the lawyers in case of compromise and 40% in case we enter into a trial.

Q. In this situation, then, frankly the chief motive in recasting that contract was to bring it into the jurisdiction of this court?

A. I wouldn't say that was the motive. It was the occasion.

Q. I have absolute confidence in you and I don't want to ask you any questions except to let you tell it in your own way.

A. If there were any such motive I would saw we certainly had in mind that we wanted to put to rest that question if it should be raised. I have before me the original contract dated November 5, 1945. The execution date was, as I have stated, December 5, and we can't determine whose writing that "5" is, but evidently whoever put it in didn't change the month to December, but let it November, which was the month originally put into it.

The Court: Is there any further examination of Mr. Cameron by any of the other parties?

Mr. Green: There is one question I overlooked.

The Court: Very well.

Q. The S½ of NE¼, of NE¼, Section 30, was not embraced in any suit?

A. That is correct.

Q. Why?

A. There are only twenty acres involved. The Betheas are residents of Clarke County, Mississippi and are very close friends of the Donalds, who are my close kinsmen, and they are friends of friends of ours and they are old people. Mr. Bethea died recently and Mrs. Bethea is in need of money. There was so little involved, and I think Mr. Buchanan will bear me out. We decided if we could settle up this little bit of royalty we would dismiss it. I will go further and state that a great deal of royalty on the Bethea tract was owned by people who were residents of Louisiana or of Texas and the plaintiffs were largely residents of Louisiana and Texas, and to have sued them would have robbed this court of jurisdiction. There just didn't seem to be enough involved and coupled with the sentimental thought about the Betheas made me omit filing any suit thus far.

Q. So it was intended to omit the suit on the S½ of the NE¼ of NE¼ of Section 30?

A. Yes sir.

Q. That suit is still pending in the Chancery Court of Jasper County?

A. I don't think it is. I think our motion over there to dismiss is 100% good. I think that court has lost jurisdiction of the case, but as far as the docket and the order of the court goes, it is still pending.

Q. Now, in a general way, what is the value of these lands for oil purposes from your viewpoint?

A. Mr. Green, I have made quite a little investigation and I don't know what the royalty is selling for, but in my opinion $1500.00 per royalty acre is fair. The Mid-Continental Oil Industry has made a survey in which I think they estimate——

Q. I don't want all that opinion.

A. These lands in suit have a bearing generally of 4000 barrels to the acre at 80¢ per barrel, which would mean that

much royalty acre or a value of $3200.00, according to my best information.

Q. So that theoretically, in your judgment, the value of this royalty would be twenty times $3200.00?

A. Yes.

Q. That is a good deal — money, isn't it?

A. About $60,000.00, according to that. I am not saying we will not file the Bethea suit. All the way through I have said we have not filed them yet.

The Court: Is there any further examination of Mr. Cameron?

Mr. Green: None, your honor.

The Court: Have you any further statements to make on your own, Mr. Cameron?

Mr. Cameron: No sir.

The Court: Mr. Green, is there any further testimony you want to offer?

Mr. Green: Yes, your honor, I would like to call Judge Easterling.

Judge L. F. Easterling, the oath having been waived, came to the witness stand and testified as follows:

Direct examination.

By Mr. Green:

Q. You are of counsel for the plaintiff?

A. Yes sir.

Q. And with your good self and Mr. Franklin an agreement originated in this protective lease, did it not?

A. Yes sir, was consummated.

Q. I hand you an instrument and will ask you to look at Sections 7 and 14 thereof and see whether or not those are the provisions that were first agreed upon between Mr. Franklin and your good self and me as a proper exposition of the statement in this case?

Mr. Cameron: We object to that. The question of the meaning of this so-called Gulf protective lease is a matter of law and if it should be construed as claimed by some of the defendants, then we ask reformation. That goes to

the merit of the case and not to the motion to dismiss and we object to any evidence about the negotiations leading up to that lease.

Mr. Green: If it be that I can show, as I think I can, that there is absolutely no foundation for my friends' contention with regard to the reformation, that will be a matter that will be considered by the court in passing on the colorable character of this conveyance in considering jurisdiction.

The Court: I will sustain the objection on the ground that the instrument speaks for itself that was finally executed. Do you have the original agreement that was finally executed?

Mr. Green: No, your honor. What happened is this and this is what I offer to prove. That Judge Easterling on behalf of his clients and myself on behalf of the Gulf tentatively arrived at an arrangement and this arrangement is expressed in this instrument in Clause 14. That this tentative arrangement between Judge Easterling and me was submitted to Judge Atkinson, who was counsel for Gulf Refining Company at Shreveport, Louisiana and thereupon the Judge re-wrote Section 14 and Section 7 in the form that it was in evidence in the protective lease, except that in the protective lease as sent back by Judge Atkinson to me the word "peace" appeared instead of "protection", and when that matter was discussed between Judge Easterling and me in conversation over the telephone we prevailed upon Judge Atkinson to modify it to that extent. The word "protection" was substituted instead of "peace". Judge Atkinson absolutely said that in order to pay this $50,000 we had to have that contract in that precise form.

The Court: I will sustain the objection on the ground that the lease as finally drafted and executed is conclusive of the agreement between the parties.

Mr. Green: That is all from Judge Easterling. When it came to drafting this arrangement on behalf of the Tidewater Association oil companies substantially the same transaction occurred and Major Wells is present and can testify to it as I offered to prove on behalf of Gulf.

Mr. Cameron: We object to that for the same reason.

The Court: I will sustain the objection for the same reason. The document that was finally executed speaks for itself and is conclusive of the agreement.

Mr. Green: This further thought was that when this lease was executed, this protective lease of December 15, 1944, here at Jackson, the Gulf Refining Company had notice of the provisions of that contract which was entered into between Judge Easterling and his clients by the terms of the contract therein and at that time it was required that Judge Easterling and Mr. Franklin should, in virtue of the conveyance made, join in that lease.

Mr. Cameron: We accept the statement of counsel that they did ask Judge Easterling and Mr. Franklin to join in the lease, but Judge Easterling and Mr. Franklin didn't think they had any business joining in it, but offered no objection to it.

Mr. Green: The same offer is made on behalf of my friend, Major Wells, for Tidewater, except that those who joined therein were, in addition, my good friends Brothers Shaw and Cameron.

Mr. Cameron: We make the same statement to that.

The Court: Very well.

Mr. Green: So far as Gulf and the Ridgeway groups, we rest.

Major Wells: We offer Mr. Buchanan to testify with reference to the place of residence and citizenship of one of the defendants in this case, Mr. Corley.

The Court: Very well.

J. R. Buchanan, the oath being waived, came to the witness stand and testified as follows:

Direct examination.

By Major Wells:

Q. Will you please give us this information about Mr. Corley?

A. Sometime ago I had occasion to bring a suit for a client of mine against T. B. Corley and I made an investiga-

tion as to his place of residence and his citizenship. At the time he was working a little in Laurel, Mississippi. My investigation developed that he was a resident and citizen of Fort Worth, Texas. Later, when this suit was filed in Federal Court, Cause No. 272, I had occasion to talk to Mr. Corley and I asked him had he changed his residence from the place which I had found on my investigation and he told me he had not, that he still owned his home in Fort Worth and the ranch or farm in Fort Worth and that he had leased the residence in which he was living at Laurel. I had occasion to talk to Mr. Walter Bailey, who owns the residence in which Mr. T. B. Corley is living in Laurel and he stated to me that he had leased Mr. Corley the place—that Mr. Corley had leased the place from him.

Major Wells: I have no further questions to ask.

The Court: Very well, are there any further questions?

Mr. Cameron: On behalf of the plaintiff we object to the statements of Mr. Buchanan in which he attemp-s to give the results of an investigation he made about the citizenship of Mr. Corley because that necessarily would be based upon hearsay and would be incompetent, irrelevant and immaterial. We move to exclude his statements for that reason.

The Court: I will sustain the objection and will sustain the motion.

Mr. Cameron: We move to exclude the statement of Mr. Buchanan that Mr. Corley stated to Mr. Buchanan certain alleged facts about his residence because that is hearsay and is a self serving declaration of a party to this suit.

The Court: I will sustain the motion.

Mr. Cameron: We move to exclude the statement of Mr. Buchanan that Mr. Walter Bailey made the statement to him about some matter that would reflect upon Mr. Corley's citizenship because that is hearsay.

The Court: I will sustain the motion.

Major Wells: As far as the Tidewater is concerned, we have no further questions.

Mr. Buchanan: As far as our client in No. 270, 271 and 272 is concerned, we have no further evidence.

Judge Stevens: As I understand it, all this is on motion to dismiss.

The Court: Yes. Is there any further testimony by anybody?

Mr. Cameron: None for us, your honor.

The Court: It is agreed between all parties that on the map Exhibit "3(a)" the well located on the NE¼ of the NE¼ of Section 30 is on the line between the Mrs. M. M. Abner tract and the P. R. Bethea tract as shown on said exhibit.

Nos. 270, 27, 272 & 278

N. L. HUDSON

vs.

MASON NEWELL, T. D. LEWIS, JETTIE KELLY WINDHAM and MARGIREE JONES, et al.

I, Theresa Herbert, Court Reporter in the United States District Court for the Southern District of Mississippi, hereby certify that the foregoing pages contain a true and correct report of the proceedings had in the trial of the above styled cases on a motion to dismiss for lack of jurisdiction.

This, the 30th day of May, 1946.

THERESA HERBERT,
Court Reporter.